71-507

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-.....

WILFRED KEYES, *et al.*,

Petitioners,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, *et al.*

APPENDIX TO PETITION FOR CERTIORARI
OPINIONS BELOW

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Opinion of District Court of July 31, 1969

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

July 31, 1969

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

—v.—

School District Number One, Denver, Colorado, *et al.*,

Defendants.

Memorandum Opinion and Order

William E. Doyle, District Judge

I. Jurisdiction

This is before us on a motion for temporary injunction. Examination of the complaint reveals that jurisdiction is invoked by reason of Title 28 U.S.C. § 1343 (3) (4), which authorizes the Court to entertain suits which seek to redress injuries resulting from violations of the Constitution of the United States. Although the Declaratory Judgment Act has been invoked, this does not of itself confer any independent jurisdiction. The Civil Rights Act is also drawn into play, Title 42 U.S.C. §§ 1983, 1985. It is alleged that the State of Colorado, acting through its agents, violated plaintiffs' constitutional rights. By reason of the allega-

tions of the complaint and the facts which have been presented, it is determined that there is subject matter jurisdiction to hear the cause.

The plaintiffs, who are school children, allege through their parents that their rights have been violated and continue to be violated through acts that have been described. Consequently, they are aggrieved persons. There is no dispute about their identity or their interest in the case, nor is there any question raised as to the propriety of a class action on behalf of all persons similarly situated. Consequently, there does not appear to be any problem about jurisdiction, personal or subject matter, to entertain the cause. Both sides have conceded that it is a matter that needs immediate attention and that it should be disposed of without delay.

II. The Issues

The pleadings describe alleged injuries resulting from the plaintiffs having been subjected to unequal treatment with respect to their right to an education. They seek to enjoin the implementation of a resolution of the School Board passed on June 9th of this year which would have rescinded previous resolutions which had made some effort to mitigate or reduce segregation which allegedly had existed in schools in the northeast part of Denver. The defendants deny that there has been any actionable segregation. Although no answer has been filed, they maintain that segregation, if any, exists by reason of maintaining neighborhood schools and natural migration, and that no action on their part has brought this about or intensified it. Basically, this is the issue which has been tried here, and has been tried rather extensively.

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The complaint herein contains several causes of action and counts. At this stage of the proceedings we are concerned only with the first cause of action and the counts which are related to it. All of these allegations pertain to the rescission of School Board Resolutions 1520, 1524 and 1531, which resolutions made changes in the attendance areas of certain high schools, junior high schools and elementary schools in northeast Denver, and undertook to desegregate these schools, all of which had become or were becoming predominantly Negro schools. It is alleged that on June 9, 1969, the newly elected School Board, by motion, rescinded all three resolutions. The complaint alleges that the action of the Board was in violation of the plaintiffs' Constitutional rights—the Fourteenth Amendment—and seeks a decree reinstating Resolutions 1520, 1524 and 1531.

The motion for preliminary injunction which is now before us seeks to enjoin the implementation of Board Resolution 1533 which would adopt and follow the policy which would carry out the practices which existed prior to the Board's adoption of Resolutions 1520, 1524 and 1531. The temporary injunction seeks maintenance of the status quo and, specifically, an order enjoining the School Board from modifying the purchase order for school buses, destroying documents relating or pertaining to the implementation of Resolutions 1520, 1524 and 1531 and, thirdly, from taking any action or making any communications to faculty, staff, parents or students during the pendency of the suit which would make it impossible or more difficult to proceed with the implementation of Resolutions 1520, 1524 and 1531. The defendants have not filed an answer. However, at the hearing they denied that any of their acts were invalid and generally maintained that they had made good faith efforts to integrate the schools in question to the extent that it was

possible to do so considering the geographic circumstances. They further maintained that the segregation, if any, was merely de facto growing out of the neighborhood character of the schools, and that the acts of the School Board do not amount to actionable or de jure segregation.

III. The Evidence of the Case

Attention at this hearing has focused primarily on the schools in northeast Denver, and particularly on the area which is commonly called Park Hill. The alleged segregated schools, elementary and junior high schools in this area, have acquired their character as such during the past ten years. The primary reason for this has been the migration of the Negro community eastward from a confined community surrounding what is commonly called "Five Points." Before 1950 the Negroes all lived in a community bounded roughly by 20th Avenue on the south, 20th Street on the west, York Street on the east and 38th Avenue on the north. The schools in this area were, and are now, largely Negro schools. However, we are not presently concerned with the validity of this condition. During this period the Negro population was relatively small, and this condition had developed over a long period of time. However, by 1960 and, indeed, at the present time this population is sizable. As the population has expanded the move has been to the east, first to Colorado Boulevard, a natural dividing line, and later beyond Colorado Boulevard, but within a narrow corridor—more or less fixed north-south boundaries. The migration caused these areas to become substantially Negro and segregated.

The trend of the population was apparent long before the migration of the Negro population eastward to Colorado Boulevard was completed. Notwithstanding this fact, the

Barrett Elementary School was built in the late 1950's for the purpose of serving a residential area west of the school, which area was destined in a short time to become populated by Negro families. When this school was completed and opened, its population was predominantly Negro. In a few years it became overwhelmingly Negro in its composition.

In the early 1960's Colorado Boulevard was somewhat of a dividing line and the area east of Colorado was for the most part Anglo. Thus Stedman School, which was a few blocks east of Colorado Boulevard, was almost entirely Anglo, while Barrett was predominantly Negro. The migration soon continued across Colorado Boulevard and within a very short time not only was the Stedman School predominantly Negro, the other elementary schools in that area, including Hallett at 2950 Jasmine Street, Smith at 3590 Jasmine Street and Phillips at 6550 East 21st Avenue (to a lesser degree) were also predominantly Negro. The single junior high school, Smiley, at 2540 Holly Street, also became predominantly Negro. Since these students attend East High School, this development threatened to result in East becoming a Negro school as well.

It is noteworthy that notwithstanding that Barrett and Stedman Schools were close to one another, no effort was made by the School Board to incorporate any part of the Stedman district into Barrett. The latter had been constructed as a small school tailored to accommodate the segregated population west of Colorado Boulevard only. None of Stedman's overcrowded white population were diverted to Barrett, and, of course, none of the Barrett students were diverted to the white Stedman.

It is also noteworthy that Negro children who had, prior to the construction of Barrett, attended Park Hill School

which had been substantially integrated, were, after the opening of Barrett, required to attend the latter school thus further assuring that Barrett would be black and Park Hill predominantly white.

Notwithstanding the Barrett experience, a recommendation was made in 1962 to construct a junior high school at 32nd and Colorado Boulevard near the Barrett School. This project was rejected after much debate and following public protest that it would be a racially segregated junior high school.

After this junior high school experience, a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools was created. Its mission was to "study and report on the present status of educational opportunity in the Denver Public Schools, with attention to racial and ethnic factors in the areas of curriculum, instruction and guidance; pupils and personnel; buildings, equipment, libraries and supplies, administration and organization; school-community relations, and to recommend improvements in any or all of such specific areas." The report of the Committee criticized the Board's establishing of school boundaries so as to perpetuate existing de facto segregation "and its resultant inequality in the educational opportunity offered." It recommended that the Board policy consider racial, ethnic and socioeconomic factors in establishing boundaries and locating new schools so as to minimize the effects of de facto segregation. It also recommended that boundaries be set so that the neighborhood established represent a heterogeneous school community.[1]

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[1] In consideration of school-community relations, the Report stated:

> In its study of the Denver community, the Committee finds that de facto segregation exists in Denver, especially in re-

Following the finding of the Study Committee Report, the Board adopted Policy 5100 which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population. However, during the years following the adoption of Policy 5100, although there was debate, there was no effective effort in the way of implementation. Finally, another Study Committee was appointed for the purpose of examining existing conditions and recommending specific procedures and guidelines to be taken. At this time there was a proposal to build an addition to the Hallett School and, indeed, it was built over the protest that it would result in intensified segregation. The final report of the second Study Committee was filed on February 23, 1967. The report of the Committee also noticed the intensified segregation in the northeast schools and recommended that there be no more schools constructed in northeast Denver. Finally, on May 16, 1968, the Board adopted the so-called Noel Resolution. This noted that the continuance of neighborhood schools had resulted in the concentration of minority and ethnic groups and

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gard to Negro citizens. Even though the Denver Public Schools have not created this pattern of residential segregation, the concentration of certain racial and ethnic groups in certain parts of the city does impose on the schools the same community pattern of de facto segregation.

The Committee agrees with the statement of the U.S. Supreme Court in 1954 in Brown v. Board of Education that segregated education is inherently unequal education. The Committee further believes that this community pattern of racial and ethnic concentration which produces racially and ethnically concentrated schools adversely affects equal educational opportunity. It further strongly believes that both school and community have a responsibility to minimize the effects of segregation if the principles of the *Declaration of Independence* and the *Constitution* are to be a reality growing out of the daily living experience of all children in the Denver community.

called for the establishment of an integrated school population so as to achieve equality of educational opportunity.

On or about January 30, 1969, following the presentation of a plan of integration by the superintendent of schools, the Board adopted Resolution 1520 which made changes in attendance areas of certain secondary schools in the school district, and on March 20, 1969, Resolution 1524, also having to do with secondary schools and junior high schools, was adopted. Resolution 1531, on the other hand, sought to change attendance areas of the elementary schools. In essence, each of these resolutions sought to reverse the segregation trend in some of the segregated schools by boundary changes which would have resulted, had they become effective, in segregated schools becoming predominantly white. It sought to spread the Negro populations of these schools to numerous other schools, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20 percent and white students from other areas would produce an Anglo population in each school of about 80 percent. At least preliminary efforts had been made by the superintendent and his staff to implement these resolutions. However, on June 9, 1969, following a School Board election and a change in the composition of the Board, the resolutions were rescinded following what was regarded as a voter mandate. Two new Board members were elected and two who had supported the integration policies were defeated. The rescission was by specific motions, and there followed a new Resolution, 1533, which undertook to restore the old order.

IV. Additional Findings

The important facts adduced at the hearing deserve special mention as circumstances which serve to show clear

patterns of segregation reinforced by official action, and which also show knowing and purposeful conduct.

1. All of the actions of the School Board here under consideration occurred during the last ten years. Thus, they took place long after the decision of the Supreme Court in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

2. The School Board Study Committee of 1964 and 1968 warned the members of the Board concerning the segregation trends and strongly recommended measures which would avoid or remedy these conditions. The recommendations contained in the 1964 report[2] were, for the most part, ignored, and this led to the appointment of a second implementation Committee which once again was positive and specific in its recommendations.

3. During the entire decade there was regular debate and although resolutions were adopted, no effective action occurred, and many of the actions which were taken had the effect of intensifying rather than alleviating the segregation problem.

4. *Assignment of Teachers.* Schools with predominantly minority student populations were shown to be staffed by a greater proportion of teachers on probationary status, teachers with less than ten years experience and minority group teachers than were schools with a predominantly Anglo student population.[3]

The Board has been reluctant to place Negro and Hispano teachers in white schools because of concern over a possible

[2] Plaintiffs' Exhibit 20.
[3] Plaintiffs' Exhibits 92, 93, 94, 96, 8-G, 8-F, 9-G, 9-H.

lack of acceptance by the white community and because of a fear of lack of support by some faculties and principals.[4] The Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (March 1, 1964) recommended that minority teachers be assigned throughout the system. This recommendation was never adopted by the Board.

By established Board policy (Policy No. 1617A) seniority of service is given consideration in making transfers, and teachers on probationary status are not to be transferred except in unusual situations. Thus, teachers on probation or with less seniority became entrenched in the minority schools where they currently serve.

This tendency to concentrate minority teachers in minority schools has helped to seal off these schools as permanent segregated schools.

5. *Establishment of Barrett School.* Plaintiffs' Exhibits 40 and 41 show that Barrett was opened in a segregated area in 1960; that it was located with conscious knowledge that it would be a segregated school; that it has remained segregated to the present date; and that the school would have been desegregated under Resolution 1531. At the time Barrett was built Stedman School, in a predominantly white area, and located a few blocks east of Barrett, was operating at approximately 20 percent over capacity. Yet Barrett was built as a relatively small school and was not utilized to relieve the conditions at Stedman.

6. *Boundary Changes.* In 1962, Superintendent Oberholtzer recommended certain boundary changes to the Board. The Board refused to adopt a change which would

[4] Plaintiffs' Exhibit 20, Pg. D-13.

have affected the overcrowded conditions at Stedman. The failure to make this proposed change tended to "aggravate and intensify the containment of the Negro population in Stedman at that time."[5] Those boundary changes which were made pertained to areas with Negro populations of less than 3 percent. Other boundary changes not only failed to alleviate Negro concentration; they added to it. In some instances the changes resulted in transfer of white students to white schools.

7. *Concentration in Existing Schools.* In June 1965, the Board considered the addition of eight classrooms at Hallett School. Hallett was at the time overcrowded and had a predominantly Negro student population. Objection was made to the additions on the grounds that they would increase segregation at Hallett.[6] The Board nevertheless proceeded with the additional classrooms. The additions were built despite Paragraph 1b (6) of Board Policy No. 1222C and Paragraph 4 of Policy No. 5100, which provided that ethnic and racial characteristics of a school population should be considered in determining boundaries and that steps should be taken to achieve more heterogeneous school populations.

8. *Mobile Classrooms.* The building of 28 mobile units in the Park Hill area in 1964 (at the time there were only 29 such units in all of Denver) resulted in a further concentration of Negro enrollment in Park Hill schools. The retention of these units on a more or less permanent basis tended to continue this concentration and segregation.

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[5] Transcript, Pp. 180-81.

[6] Transcript, Pg. 37.

9. *Effect of Resolutions 1520, 1524 and 1531.* Had the rescinded resolutions been implemented, Dr. Bardwell estimated (based on 1968 enrollment figures) that the "segregation index" in senior high schools would have decreased from 50 to 28; that the index in junior high schools would have decreased from 65 to 35; and that the decrease in the index for elementary schools would have been from 60 to 43 which, he testified, would approximately result in desegregation of elementary schools.

10. The above noted Board actions must be considered in the light of the trend toward increased segregation in northeast Denver schools (for example, between 1960 and 1966 Stedman increased from 4 percent Negro to 89 percent Negro; in that same period Hallett increased from 1 percent Negro to 75 percent Negro).

11. The climactic and culminative act of the Board was the June 9 rescission of Resolutions 1520, 1524 and 1531. Four members of the Board voted to rescind the resolutions and adopted Resolution 1533, which embraced policies in derogation of the previous policies as expressed in the mentioned resolutions. The majority of the Board (Board members Voorhees, Noel and Amesse voted against it) acted officially to reject the integration effort and to restore and perpetuate segregation in the area. Although this was carried out in response to what was called a voter mandate, there can be no gainsaying the purpose and effect of the action as one designed to segregate.

We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially

certain. Under such conditions the action is unquestionably wilful.[7]

V. The Applicable Law

The foundation stone in any case involving discrimination in public schools is the Constitution of the United States and, in particular, the Equal Protection Clause of the Fourteenth Amendment to the Constitution. That Clause, in guaranteeing to every citizen the equal protection of the laws, forbids state action which results in unreasonable classifications and deprivations. It prohibits arbitrary classifications which bear no rational relation to any valid governmental purpose.

The history of modern case law dealing with the invalid discrimination resulting from school segregation dates from 1954, the year in which the Supreme Court handed down Brown v. Board of Ed., 347 U.S. 483, 74 S.Ct. 686. The Supreme Court there held that segregation in public schools violated the Equal Protection Clause. However, the case certainly went much further than this. The Court plainly stated that segregated schools are incapable of providing quality education and also said that the effect of segregation in the school system was to place an indelible stamp of inferiority on those Negro children who were compelled to attend "Negro" schools. Thus, the clear import of the *Brown* decision is that neither a state nor its agencies may establish, maintain or lend support to a system of segregated public education. Furthermore, if the state or any of its agencies prior to or after *Brown* take any action which creates or furthers segregation, a positive duty arises to remove the effects of such de jure segregation.

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[7] Restatement of Torts, § 500, comments f and g at 1296 (1934).

Admittedly, the facts of the case at bar are different from *Brown*, but the legal implications of the *Brown* case are fully applicable here. These legal implications have been considered in two opinions of our Court of Appeals. The first of these cases, Downs v. Board of Ed., 336 F.2d 988 (10th Cir., 1964), dealt with the Kansas City school system. Until 1951 this school system had been segregated by law and, at the time that *Brown* was decided, the schools remained substantially segregated. Thereafter, the school board took affirmative steps to alleviate the situation created by the prior policy of segregated schools. The trial court found that the board had acted in good faith to remove segregation in the school system and that the minimum requirements of *Brown* had been met. The board had also undertaken to change certain school district boundaries and these changes had the effect of aggravating segregation in at least one of the city's junior high schools. The trial court held that the board's action did not violate the Fourteenth Amendment since the boundary change was made in good faith and not for the purpose of promoting or maintaining segregation.

In affirming the district court, the Court of Appeals laid down guiding principles to be applied in future cases. It distinguished two factual situations: (1) Where the school board takes affirmative action which has the effect of promoting or maintaining segregation; and (2) Where because of population shifts and housing patterns certain schools have become segregated—so-called de facto segregation. As to the former, the Court said that it must appear that the board's action not only resulted in aggravating segregation, but also that the board acted purposefully with this object in mind. As to the latter, the Court said that the better rule was that there is no affirmative duty to integrate

races in the public schools.[1] The trial court in *Downs* had found that the school board in that case had made a good faith attempt to conform to the law. The Circuit Court was reluctant to overturn these findings since the district court had heard the evidence.

In Board of Ed. of Oklahoma City Public Schools, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), the Tenth Circuit Court of Appeals affirmed the decision of the District Court of Oklahoma, which Court had ordered the school board of Oklahoma City to undertake a plan for desegregation, which plan had been formulated by experts appointed by the Court. Thus, in reality it was the Court's plan. Prior to *Brown* the Oklahoma City school system was segregated pursuant to constitutional and statutory mandate. Both the

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[1] Whether the Court would now give broad effect to this is, of course, irrelevant in the present case, but in view of later developments in the law, the question arises as to whether it would say the same thing today since the cases which it cited in support of this proposition have been largely overruled. Thus, in United States v. Jefferson County Bd. of Ed., 380 F.2d 385 (5th Cir. 1967) (en banc), the Fifth Circuit Court of Appeals overruled four of the opinions cited in support of the statement in *Downs* that "the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools * * *." (Evers v. Jackson Municipal Separate School Dist., 328 F.2d 408 (5th Cir. 1964); Stell v. Savannah-Chatham County Bd. of Ed., 333 F.2d 55 (5th Cir. 1964); Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960); and Avery v. Wichita Falls Independent School Dist., 241 F.2d 230 (5th Cir. 1956)). The *Jefferson County* opinion states:

> The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. (Footnotes omitted).

380 F.2d at 389.

trial court and the Tenth Circuit read the *Brown* decision as requiring affirmative action to remove segregation which had been purposefully caused by prior actions of the school board. The opinion by Judge Hill saw nothing new in a court of equity taking positive steps to integrate the schools.

It is sufficient to say that we are not here faced with the kind of simple or innocent de facto segregation which was found to exist in *Downs*. We have seen that during the ten year period preceding the passage of Resolutions 1520, 1524 and 1531, the Denver School Board has carried out a segregation policy. To maintain, encourage and continue segregation in the public schools in the face of the clear mandates of Brown v. Board of Ed. cannot be considered innocent. The many cases decided subsequent to *Brown*, including our own Circuit's Board of Ed. v. Dowell, impose an affirmative duty on the School Board to take positive steps to remove that segregation *which has developed as a result of its prior affirmative acts*. In response to this duty, the Denver School Board passed Resolutions 1520, 1524 and 1531. In light of *Brown* and *Dowell*, the effort of the Board to renounce this constitutional duty by rescission must be rejected as arbitrary state legislative action.

The defendants have alluded to the fact that Resolution 1533 represents the will of the people, and that any action taken by this Court which would adversely affect the Resolution would frustrate that will. But as we have seen Brown v. Board of Ed. and all of the subsequent cases hold that equal protection of the laws is synonymous with the *right* to equal educational opportunities and that segregated schools can never provide that equality. The constitutional protections afforded by the Bill of Rights and the Fourteenth Amendment were designed to protect fundamental

rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967);[9] Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964).

It is to be emphasized finally that this present case, except for the presence of clear evidence of purpose manifested by the precipitate rescission, is by no means novel. The right to equality in education has, since *Brown*, become recognized as a sensitive constitutional right. Courts throughout the country have taken positive, affirmative steps in order to uphold these rights. In our own Circuit, both the *Downs* and *Dowell* opinions have clearly identified and explained the governing legal principles. In other jurisdictions, United States Courts have granted broad affirmative relief in such situations, including orders requiring the adoption of detailed plans for segregation.[10]

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[9] In this case, the Supreme Court struck down a California constitutional amendment on the ground that it was not merely a repeal of a positive action encouraging integration, but that the rejection, in effect, authorized discrimination by turning back to the conditions which existed prior to its adoption. It thus encouraged and in a significant way involved the state in racial discrimination contrary to the Fourteenth Amendment. Hence, it was not an exhibition of complete neutrality.

[10] *See, e.g.*, United States v. School Dist. 151, 286 F.Supp. 786 (N.D.Ill.), *aff'd.*, 404 F.2d 1125 (7th Cir. 1968); Coppedge v. Franklin County Bd. of Ed., 273 F.Supp. 289 (E.D.N.Car.), *aff'd.*, 394 F.2d 410 (4th Cir. 1968); Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969); Blocker v. Board of Ed., 226 F.Supp. 208 (E.D. N.Y. 1964); Taylor v. Board of Ed., 191 F.Supp. 181 (S.D.N.Y.), *aff'd.*, 294 F.2d 36 (2d Cir. 1961).

In the present case, this Court has held only that the Denver School Board may not constitutionally take action which perpetuates segregation, and so it sets no new precedent.

In determining that the plaintiffs are entitled to the preliminary relief sought, we are not to be understood as holding that Resolutions 1520, 1524 and 1531 are exclusive. It is true that the case is extraordinary in that there are only two plans presented, one calling for integration and one for segregation. The status quo has the effect of restoring the integration plan. However, the Board is by no means precluded from adopting some other plan embodying the underlying principles of Resolutions 1520, 1524 and 1531.

VI. Conclusion

Under the Fourteenth Amendment the plaintiffs, as citizens of the United States, have the right to be protected from official action of state officers which deprives them of equal protection of the laws by segregating them because of their race. The denial of an equal right to education is a deprivation which infringes this constitutional guarantee. The precipitate and unstudied action of four of the members of the Board rescinding and nullifying the school integration plan, which plan had been adopted after almost ten years of debate and study, and the adoption in its place of a substitute plan which would have had the effect of

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In our own Circuit, sweeping plans for desegregation were formulated by the United States District Court for the Western District of Oklahoma on its own initiative after the school board failed to act, and these plans were approved by the Court of Appeals. Dowell v. School Board of Oklahoma City Public Schools, 244 F.Supp. 971 (W.D.Okl.), *aff'd.*, 375 F.2d 158 (10th Cir. 1967).

In *Hobson*, Circuit Judge Wright, sitting by assignment in District Court, adopted an intricate and detailed integration plan.

perpetuating school segregation, had not only a chilling effect upon their rights; it had a freezing effect. Under the law of the case, we have no alternative. The action taken must be ruled unconstitutional, and the proposed action must be enjoined.

The case is a proper one for injunctive relief because (1) Plaintiffs have no adequate remedy at law; (2) Plaintiffs would suffer irreparable injury if relief were denied; and (3) Plaintiffs will probably succeed at trial, at least on the cause of action under consideration.

The motion for preliminary injunction is granted.

Opinion of District Court of August 14, 1969

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

Aug. 14, 1969.

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

—v.—

School District Number One, Denver, Colorado, *et al.*,

Defendants.

Supplemental Findings, Conclusions and Temporary Injunction

William E. Doyle, District Judge.

This case is before the Court following remand issued by the United States Court of Appeals for the Tenth Circuit on August 7, 1969. In its opinion the Court of Appeals (1) questioned the sufficiency in terms of specificity of our injunctive order, and (2) directed that this Court consider Title IV, § 407(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000c-6(a).

A hearing was held on August 7, 1969. The Court, having heard the arguments, does hereby issue a more specific injunctive order. The question of the applicability of the above mentioned statute will be considered in a supplemental opinion. Also, the following supplemental findings

are added to the oral findings of fact given from the bench on July 23, 1969, and the formal findings of fact contained in this Court's opinion issued on the 31st day of July, 1969. The findings hereinafter set forth are directed to the schools which received particular attention at the trial. These findings undertake to describe the special circumstances surrounding these particular schools, and the conclusions which are to be drawn from these findings.

Findings of Fact

Barrett Elementary School (Located at East 29th Avenue and Jackson Street.)

1. Barrett Elementary School was opened in 1960. At that time its student body was 89.6 percent Negro. Presently the racial composition of Barrett is virtually 100 percent minority students (93% Negro, 7% Hispano). Thus, from the time of its establishment until the present Barrett has always been a segregated school.

2. The average percentage of Negro teachers in elementary schools in School District No. 1 as of September 1968 was 8.5 percent. In Barrett school the percentage of Negro teachers is 52.6 percent. This concentration of Negro teachers in a "Negro" school has further contributed to the categorization of Barrett as a segregated school.

3. Between 1950 and 1960 the Negro population, which previously had been concentrated in an area known as "Five Points" began to expand to the east. By 1960 it had moved up to Colorado Boulevard, a natural dividing line. This trend of population was apparent long before the migra-

tion of the Negro population eastward to Colorado Boulevard was completed. With full knowledge of this population trend and the fact that Barrett would be a segregated school from the time of its establishment, the Board proceeded with and carried into effect the plans for the building of that school.

4. At the time that Barrett was built, the School Board created the eastern boundary of the Barrett district along Colorado Boulevard. Thus, the eastern boundary of Barrett school district was made coterminous with the eastern boundary of Negro population movement at that time. This insured the character of Barrett as a segregated school.

5. When Barrett was built, Stedman Elementary School, in a predominantly white area east of Colorado Boulevard a few blocks from the Barrett site, was operating at approximately 20 percent over capacity. Had the eastern boundary of the Barrett district been set to the east of Colorado Boulevard, it would have resulted in some integration of Barrett, while alleviating somewhat the overcrowded conditions at Stedman. By establishing Colorado Boulevard as the eastern boundary of the Barrett district, the Board declined to utilize Barrett to achieve these salutary effects. Furthermore, Barrett was built as a relatively small school (capacity 450) which further prevented its use to relieve overcrowded conditions in the neighboring "white" Stedman. Thus, Barrett was built and opened as a segregated school.

6. In light of the facts as they existed in 1960, there can be no doubt that the positive acts of the Board in establish-

ing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation, which condition exists at present.

7. The action by the Board with respect to the creation of Barrett school was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. Under such conditions we find that the Board acted purposefully to create and maintain segregation at Barrett.

8. The Board maintained the segregated condition which it had created at Barrett by failing to take any action to correct it between 1960 and 1969. On April 24, 1969, the Board passed Resolution 1531 (operative September 1969) which would have desegregated Barrett by altering school district boundaries. Prior to the passage of Resolution 1531, Barrett was 93 percent Negro and 7 percent Hispano. The racial composition in that school subsequent to implementation of 1531 would have been 73 percent Anglo, 24 percent Negro, 3 percent Hispano.

9. On June 9, 1969, the Board, by a 4 to 3 vote, rescinded Resolution 1531 and thereby reaffirmed its prior policy of maintaining and perpetuating segregation at Barrett. Although this was carried out in response to what was called a voter mandate in a school board election, there can be no doubt that the purpose and effect of the action was segregation.

Stedman Elementary School (This school is located at East 29th Avenue and Dexter Street, approximately 8 blocks east of Barrett Elementary School.)

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1. Stedman Elementary School was in 1960 a predominantly "white" school, the student body being only 4 percent Negro. However, as a result of Negro population trends and rigid adherence to school boundaries by the Board, by 1962 Stedman was 50-65 percent Negro.

2. In 1962 and for several years prior thereto, Stedman had been overcrowded. Although Stedman could not be considered a segregated school at that time, it was clear by virtue of area population movement that it would become segregated in the near future if immediate steps were not taken to alleviate the overcrowding and stabilize the racial composition. Seven boundary changes were proposed in 1962, three of which would have relieved overcrowding at Stedman by placing the overflow in Smith, Hallett, and Park Hill, each of which was predominantly Anglo at that time. The Board rejected the three Stedman proposals, adopting the other four which pertained to areas with Negro populations of less than three percent. By refusing to pass the proposed boundary changes for Stedman, overcrowding was perpetuated and Negro students at that school were prevented from attending nearby "Anglo" schools.

3. By 1963 Stedman was only 18.6 percent Anglo and was still overcrowded. In 1964, the Board adopted several boundary changes, two of which had the immediate effect of aggravating the segregated situation at Stedman by transferring predominantly Anglo portions of the Stedman district to other "white" schools in the area. First, a predominantly "white" portion of the Stedman zone was detached to Hallett. Second, the Park Hill-Stedman optional zone was transferred to Park Hill. This area was

approximately 96 percent Anglo, and represented that part of the Stedman district with the lowest Negro population. These changes did not significantly reduce overcrowding at Stedman. Rather, they tended to further segregate Stedman by removing the option open to many Anglo students to attend Stedman and preventing Negro students at that school from attending the predominantly Anglo schools in Park Hill.

4. Between May 1964 and May 1965, four mobile units were placed at Stedman to relieve the overcrowded conditions. This, like the previous actions of the Board with respect to school boundaries in the Stedman district, had the effect of preserving the Anglo character of certain Park Hill schools and the segregated status of Stedman.

5. As of 1968, Stedman was 94.6 percent Negro and 3.9 percent Anglo. On April 24, 1969, the School Board passed Resolution 1531 which was designed to alleviate the containment of Negro students in Stedman which had resulted from the Board's conscious efforts to preserve the Anglo character of other Park Hill schools. While 1531 would not have substantially reduced the *percentage* of Negro students at Stedman, it did provide that an additional 120 Negro children were to be transported from Stedman to predominantly Anglo schools (prior to this time 286 Stedman students were being bussed to Force, Schenck, and Dension schools). This would have provided an additional outlet for Negro children at Stedman, enabling them to attend a racially integrated school, and at the same time would have removed the need for the four mobile units. This was designed to relieve and mitigate the intense segregation condition at Stedman as well as to relieve overcrowding.

6. On June 9, 1969, the School Board repealed Resolution 1531. The natural and probable consequence of the Board's action was to continue the containment of Negro students at Stedman and to reassign Negro children who would have attended an integrated school under Resolution 1531 to the segregated Stedman.

7. The actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the "white" character of other Park Hill schools.

Park Hill and Philips Elementary Schools (Park Hill is located at 5050 East 19th Avenue, which is approximately 8 blocks south and 6 blocks east of Barrett. Philips is located at 6550 East 21st Avenue, which is 7 blocks south and 25 blocks east of Barrett.)

1. In 1960 both Park Hill and Philips Elementary Schools were overwhelmingly Anglo in racial composition. Despite continued Negro population movement into these school districts, Park Hill and Philips presently continue to have a majority of Anglos in the student body. This characteristic of both schools is due at least in part to the efforts of the Board to prevent the use of Park Hill and especially Philips to relieve the overcrowding at Stedman.

2. By 1968 the racial composition of Park Hill was 71.0 percent Anglo. 23.2 percent Negro and 3.9 percent Hispano. The racial composition of Philips was 55.3 percent Anglo, 36.6 percent Negro and 5.2 percent Hispano. The prob-

able result of maintaining rigid school boundaries in these districts combined with the present trend of Negro population movement would be the transition of Philips and Park Hill into substantially segregated schools.

3. On April 24, 1969, the Board passed Resolution 1531 which would have stabilized the racial composition of these two schools (Park Hill would have been stabilized at 79 percent Anglo, 13 percent Negro, 8 percent Hispano; Philips would have been stabilized at 70 percent Anglo, 22 percent Negro, 8 percent Hispano), by a system of transporting some 70 students at Park Hill to Steele and Steck Elementary Schools and 80 students from Philips to Ashley and Palmer Elementary Schools. Also, 80 students would be transported to Philips from Palmer and Montclair Elementary Schools. Resolution 1531 recognized the interrelationship between Philips and Park Hill schools and Stedman, Barrett and Hallett. Thus, even though Philips and Park Hill were not segregated as of 1969, the Board felt that effective desegregation could take place at Barrett, Stedman and Hallett only if other Park Hill area schools were included in a total plan.

4. The School Board repealed Resolution 1531 on June 9, 1969. The effect of this action was to restore the original boundaries in the Park Hill and Philips districts, the probable result of which would be a gradual increase of Negro students into Park Hill and Philips schools ultimately approaching a segregated situation. Furthermore, by repeal of 1531 Park Hill and Philips would be reestablished as buffers against the influx of Negro children into other Anglo schools in the Park Hill area. Stedman, Barrett and Hallett would be returned to their status as over-

crowded, segregated schools with no effective outlet provided into predominantly Anglo schools such as Ashley and Palmer.

5. In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and reestablishing the original district boundaries, the Board must be regarded as having acted with a purpose of approving those consequences.

6. These boundary changes for Park Hill and Philips are necessary to the success of the entire plan called for in Resolution 1531.

Hallett Elementary School (Hallett is located at 2950 Jasmine Street, 20 blocks east of Barrett.)

1. The Negro enrollment at Hallett Elementary School has increased from approximately one percent in 1960 to 90 percent in 1968.

2. In 1962 several boundary changes in the Park Hill elementary school districts were proposed and all but three were adopted by the Board. One of the three boundary proposals considered but not adopted would have detached part of the Stedman district to Hallett. At that time Stedman was 50-65 percent Negro and was overcrowded, whereas Hallett was operating under capacity and was approximately 85-95 percent Anglo. The adoption of this boundary change would have relieved some overcrowding at Stedman while increasing Negro enrollment at Hallett. By refusing to adopt the change, Negro students were confined in an overcrowded, segregated school and were denied the opportunity of attending an integrated school.

3. One of the 1962 boundary changes which was adopted assigned the Hallett-Philips optional zone to Philips. This reassigned zone was predominantly Anglo and Philips was at this time virtually 100 percent Anglo. There was no problem of overcrowding at either Hallett or Philips. All that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo.

4. By 1964 Hallett was 68.5 percent Anglo. A boundary change in that year detached a predominantly Anglo area from the Stedman district to Hallett, and detached an 80 percent Anglo area from Hallett to Philips. This latter area constituted the section of highest Anglo concentration in the Hallett district. After the 1964 boundary changes, Hallett was only 41.5 percent Anglo. This decrease in Anglo enrollment was due in part to the transfer of the predominantly "white" portion of Hallett's attendance area to Philips.

5. In 1965 four mobile units were constructed at Hallett. Shortly thereafter the Board also approved the construction of additional classrooms. At this time Hallett was approximately 75 percent Negro. The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area.

6. Resolution 1531, adopted by the Board on April 24, 1969, provided that the Superintendent develop and institute plans to make Hallett a demonstration integrated school by use of voluntary transfer of pupils. The pro-

posed plan would have transferred 500 Anglo students to Hallett while transporting 500 Hallett pupils to predominantly Anglo schools. This would have decreased the Negro concentration at Hallett from approximately 90 percent to about 40 percent.

7. Resolution 1533, passed by the Board after the rescission of Resolution 1531, also provides for a "voluntary exchange plan" for Hallett. Although this latter resolution does not refer to the purpose of integration, as did Resolution 1531, its intention seems to be substantially similar to that of 1531 with regard to the Hallett situation.

Smiley Junior High School (Smiley is located at 2540 Holly Street.)

1. In 1968 Smiley Junior High School was 23.6 percent Anglo, 71.6 percent Negro and 3.7 percent Hispano. The elementary school feeders for Smiley are Hallett (10.1 percent Anglo, 84.4 percent Negro, 3.7 percent Hispano); Park Hill (71 percent Anglo, 23.2 percent Negro, 3.9 percent Hispano); Smith (2.8 percent Anglo, 94.9 percent Negro, 1.6 percent Hispano); Philips (55.3 percent Anglo, 36.6 percent Negro, 5.2 percent Hispano); Stedman (3.9 percent Anglo, 92.4 percent Negro, 2.9 percent Hispano); Ashley (85.8 percent Anglo, 6.4 percent Negro, 5.8 percent Hispano); and Harrington (5.0 percent Anglo, 77.7 percent Negro, 15.2 percent Hispano). Because of Negro population movement into this area, it is substantially certain that continuance of the boundaries as reestablished by repeal of Resolutions 1520 and 1524 will result in Smiley becoming almost completely Negro in the future.

2. Smiley has the second highest number of minority teachers of any junior high school in the city. There are 23 Negro and Hispano teachers at Smiley, while no other junior high school, with the exception of Cole, has more than six teachers from racial minority groups.

3. In light of the racial composition of the Smiley student body and faculty in 1968, the racial composition of the Smiley feeders, and Negro population movement into the area, we find that in 1968 Smiley was a segregated school.

4. In 1969 the School Board undertook to correct the segregated situation at Smiley by the adoption of Resolutions 1520 and 1524. These Resolutions were designed to desegregate Smiley by a substantial alteration of junior high school boundary lines. Had the Resolutions been implemented, the racial composition of Smiley would have been 72 percent Anglo, 23 percent Negro, and 5 percent Hispano.

5. On June 9, 1969, the Board repealed Resolutions 1520 and 1524. The effect of this repeal was to reestablish Smiley as a segregated school by affirmative Board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75 percent minority and that future Negro population movement would ultimately increase this percentage. Thus, the Board acted with full knowledge of exactly what the consequences of the repeal would be. We, therefore, find that the action of the Board in rescinding Resolutions 1520 and 1524 was wilful as to its effect on Smiley.

East High School (East is located at 1545 Detroit Street.)

1. Before passage of Resolution 1520, East High School was approximately 54 percent Anglo, 40 percent Negro and 7 percent Hispano. Resolution 1520 would have reduced the racial minority enrollment at East to 32 percent. Neither before nor after the passage of 1520 could East be considered a segregated school.

2. The boundary changes embodied in Resolutions 1520, 1524, and 1531 would have indirectly affected the racial composition of East through changes in East's feeder schools. Rescission of these Resolutions might, through the feeder system, result in a segregated situation at East in the future.

SUMMARY OF FINDINGS

All of the elementary schools discussed in the supplemental findings set forth above are located in the Park Hill area. There is a high degree of interrelationship among these schools, so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the others. Furthermore, since all of these elementary schools operate as feeders for Smiley Junior High School (with the exception of Barrett), any factors affecting the racial composition of the elementary schools will also have a similar effect on Smiley. It is significant to note that Board actions between 1960 and 1969, such as the 1962 and 1964 boundary changes, dealt with the entire Park Hill area and had some effect on each school in that section of the city. Thus, the Board itself has continuously recognized the interrelationship of schools in northeast Denver.

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Between 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students first in Barrett, and later in Stedman and Hallett while preserving the Anglo character of schools such as Philips and Park Hill. The ultimate effect of the Board's actions and policies in the face of a steady influx of Negro families into the area was to create and maintain segregated situations at Barrett, Stedman, and Hallett which ultimately led to a substantially segregated situation at Smiley.

In adopting Resolutions 1520, 1524 and 1531, the Board recognized its constitutional responsibility to desegregate schools in northeast Denver. These Resolutions were adopted by a five to two majority following the recommendations of both the Special Study Committee created in 1962 and a second committee created in 1966, and recommendations contained in the report of Dr. Gilberts and the Board staff submitted in October 1968. The reports of the 1962 and 1966 committees made clear that the continued rigid adherence to the established school boundary lines had led to segregation in several Park Hill schools. These Resolutions constituted legitimate legislative action designed to remove the segregation in Park Hill schools by means which were both moderate and reasonable in light of existing conditions.

Resolutions 1520, 1524, and 1531 were designed to relieve segregation in Barrett, Stedman, Hallett and Smiley by altering school district boundaries. Among other things these Resolutions would have transferred heavily concentrated Negro portions of the Barrett, Park Hill, Philips and Smiley districts to predominantly Anglo schools, while transporting a substantial number of Anglo students to the segregated schools. Segregation at Hallett and Sted-

man was to be relieved by a vigorous policy of voluntary bussing. Although at the time these Resolutions were passed Philips and Park Hill schools were not segregated, the Board recognized that they were key elements in dealing with the interrelated situation in northeast Denver and that any overall scheme for desegregating Barrett, Hallett, Stedman and Smiley would necessarily require affirmative action with respect to Park Hill and Phillips.

On June 9, 1969, the Board rescinded Resolutions 1520, 1524 and 1531. This action was taken with little study and was not justified in terms of educational opportunity, educational quality or other legitimate factors. The only stated purpose for the rescission was that of keeping faith with the will of the majority of the electorate.

The effect of the rescission was to restore and perpetuate the status quo as it existed in northeast Denver prior to the passage of Resolutions 1520, 1524 and 1531. This status quo was one of segregation at Barrett, Hallett, Stedman and Smiley. As a replacement for proposals embodied in Resolutions 1520, 1524, and 1531, the Board adopted Resolution 1533 which in essence provides for desegregation on a voluntary basis, a program which has been unsuccessful and which furnishes little promise.

Conclusions of Law

1. The policies and actions of the Board prior to the adoption of Resolutions 1520, 1524 and 1531, which conduct is specifically described in the foregoing findings, constitute de jure segregation.

2. The adoption of Resolutions 1520, 1524 and 1531 was a bona fide attempt of the Board to recognize the constitutional rights of the persons affected by the prior segregation.

3. The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void.

4. Section 407(a) of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000c-6(a) has been fully considered. It does not apply to a private civil rights action asserting violation of the Constitution. A supplemental opinion will expound the reasons in support of this conclusion.

PRELIMINARY INJUNCTION

This matter having come on for hearing upon remand by the Court of Appeals for the Tenth Circuit on the motion of plaintiffs for a preliminary injunction, and the Court having heard the testimony of the witnesses, having reviewed and considered the exhibits in evidence herein, and having heard the statements of counsel:

The Court finds that:

1. The Court has jurisdiction over the subject matter of this action under 28 U.S.C. Sections 1343(3) and 1343(4). This is a civil action authorized by law and arising under Title 42 U.S.C. Section 1983 and the Fourteenth Amendment of the Constitution of the United States;

2. The Court has jurisdiction over the parties herein;

3. Plaintiffs and the classes which they represent have no adequate remedy at law;

4. Unless this preliminary injunction issues, plaintiffs and the classes which they represent will suffer irreparable injury;

5. Plaintiffs and their classes have demonstrated a reasonable probability that they will ultimately prevail upon a full trial of the merits herein.

Based upon the foregoing findings together with those contained in the opinion heretofore rendered it is

Ordered, adjudged and decreed that the motion for a temporary injunction should be and the same is hereby granted to the following extent:

The defendants, their agents and servants are enjoined and restrained, during the pendency of this action, from any conduct which would modify the status quo as it existed prior to June 9, 1969, in respect to acquisition of equipment, destruction or relocation of documents, writings and memoranda, and are further enjoined and restrained from implementing Resolution 1533, insofar as that Resolution is an integral part of the rescission of Resolutions 1520, 1524 and 1531, and would seek to restore the segregated conditions which existed prior to the adoption of Resolutions 1520, 1524 and 1531.

The defendants, their agents and servants are further ordered to make effective the following integration policies:

Resolution 1520 insofar as it applies to Smiley Junior High School (specifically, paragraphs six and seven of the boundary changes embodied in the said Resolution 1520);

Resolution 1524 insofar as it applies to Smiley Junior High School (specifically, paragraphs one through nine, inclusive, of the boundary changes embodied in Resolution 1524) (paragraphs eight and nine being necessary to the desegregation of Smiley Junior High School). Paragraphs A, B, C, and D of Resolution 1524, which deal with Cole

Junior High School, are not here considered, but nothing herein contained is intended to prevent the implementation of those boundary changes. Ruling on these changes is reserved until the trial.

Resolution 1531 insofar as it applies to boundary changes concerning Barrett, Park Hill and Philips Elementary Schools, and insofar as it directs the Superintendent to establish Hallett Elementary School as a demonstration integrated school through voluntary transportation and to continue the practice of transporting students from Stedman Elementary School to relieve overcrowding and to permit the removal of mobile classroom units at that school.

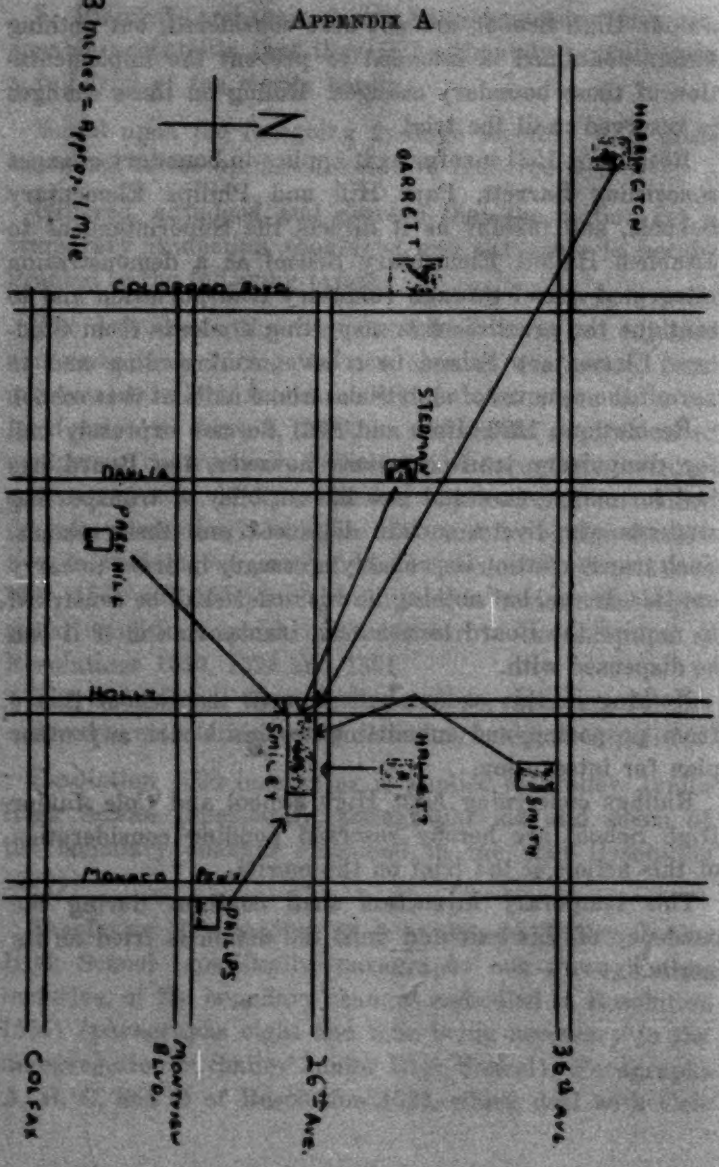
Resolutions 1520, 1524 and 1531 do not expressly call for compulsory transportation; however, the Board has had for many years and now has a policy of transporting students who live a certain distance from their schools. Such transportation is probably necessary in order to carry out this decree, but nothing in this order shall be construed to require the Board to use such transportation if it can be dispensed with.

Nothing in this order shall prevent the School Board from proposing and submitting to this Court any other plan for integration.

Rulings concerning East High School and Cole Junior High School are hereby reserved pending consideration of this action at the trial on the merits.

This temporary injunction shall continue during the pendency of this suit and until the action is tried on its merits.

APPENDIX A


3 Inches = Approx. 1 Mile
N
COLORADO BLVD.
GARRETT
HARRINGTON
STEDMAN
DANLIA
PARK HILL
HOLLY
SMILEY
HOUSTON
SMITH
MONACO
PHILLIPS
COLFAX
MONTVIEW BLVD.
26TH AVE.
36TH AVE.

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OPINION AS TO APPLICABILITY OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964

The Court of Appeals for the Tenth Circuit has remanded this case in part for this Court's prior determination of the applicability and effect of Section 407(a) of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6(a)), which Section contains the following proviso:

> provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

We have considered the arguments of counsel, both oral and in briefs. We conclude that the above proviso does not limit the power of this Court to direct the School Board to implement Resolutions 1520, 1524 and 1531 to the extent ordered.

Section 407(a) refers to actions brought by the Attorney General of the United States under the authority granted him by that Section. The proviso appears in this context, and thus on its face does not apply to a case such as this, which is not brought by the Attorney General. Defendants call our attention to a comment made by then Senator Humphrey during Congressional debate on the Act to the effect that the proviso applies to the entire 1964 Civil Rights Act. Assuming that construction to be correct, the instant

case is not brought under the 1964 Civil Rights Act but rather under 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

The legislative history of Section 407 (a) indicates that the proviso meant only that Congress was not taking a position on the question of the propriety of transportation to achieve racial balance in a case of *de facto* segregation. *See* United States v. Jefferson County Bd. of Ed., 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing with order modified*, 380 F.2d 385 (5th Cir. 1967) (en banc).

We have concluded that the instant case is one in which the Board has actively contributed to the segregated conditions found to exist. The act applies, if at all, to a *de facto* segregation situation. The Court of Appeals for the Seventh Circuit made this distinction in United States v. School District 151 of Cook County, Illinois, 404 F.2d 1125 (7th Cir. 1968), where it was held that the proviso in Section 407(a) had no application where transportation was "not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination." 404 F.2d at 1130. Counteracting a legacy is precisely what the order in the instant case is intended to do.

The language of the proviso indicates that its purpose was to prevent the implication that Section 407(a) enlarged the powers of the federal courts. The proviso states that the Section grants a court no power to order transportation to achieve racial balance, nor does the Section "otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The equitable powers of the courts in directing compliance with constitutional mandates exist independent of the 1964 Civil Rights Act. United States v. Jefferson County Bd. of Ed., 372 F.2d 836,

880 (5th Cir. 1966). The proviso merely explains that Section 407(a) is not to be construed to enlarge the powers of the courts; it does not limit those powers.

It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which Section 407(a) itself is intended to remedy. The Congressional policy behind the 1964 Act should not be diluted by such a construction.

In United States v. School District 151 of Cook County, Illinois, 286 F.Supp. 786 (N.D.Ill.1968), the district court considered the instant question and concluded:

> That provision of 42 U.S.C. § 2000c-6 which withholds from the courts the power to require transportation of pupils to overcome racial imbalance in public schools must be construed to relate to so-called de facto or adventitious segregation. It is inapplicable where, as here, the existing segregation of pupils and teachers is inseparable from the practices and policies of the defendants. 286 F.Supp. at 799.

In affirming this construction of the statute the Court of Appeals for the Seventh Circuit used the following strong language:

> Defendants next contend that they have no constitutional duty to bus pupils, in the District, to achieve a racial balance. It is true that 42 U.S.C. § 2000c-6 withholds power from officials and courts of the United States to order transportation of pupils from one school to another for the purpose of achieving racial balance. However, this question is not before us. Although we recognize that past residential segregation itself, in the District, severely unbalanced racially the

school population, the district court's judgment is directed at the unlawful segregation of Negro pupils from their White counterparts which is a direct result of the Board's discriminatory action. Therefore, the district court's order is directed at eliminating the school segregation that it found to be unconstitutional, by means of a plan which to some extent will distribute pupils throughout the District, presumably by bus. This is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination.

The Constitution forbids the enforcement by the Illinois School District of segregation of Negroes from Whites merely because they are Negroes. The congressional withholding of the power of courts in Section 2000c-6 cannot be interpreted to frustrate the constitutional prohibition. The order here does not direct that a mere imbalance of Negro and White pupils be corrected. It is based on findings of unconstitutional, purposeful segregation of Negroes, and it directs defendants to adopt a plan to eliminate segregation and refrain from the unlawful conduct that produced it. United States v. School District 151 of Cook County, Illinois, 404 F.2d 1125, 1130 (7th Cir. 1968).

Judge Wisdom, writing for the Court of Appeals for the Fifth Circuit in the *Jefferson County* case, also considered the applicability of the statute to a *de jure* case and determined that it did not apply.

The above are the sum total of court decisions on the subject. However, they dispel any doubt as to its applicability.

We add that in reevaluating the case in light of the statute and in reconsidering Resolutions 1520, 1524 and 1531, we determined that the effort in 1520 to desegregate East High School was not within the ambit of a preliminary injunction either because of the statute or for the equally good reason that the evidence as of now fails to disclose a condition at East which merits a preliminary injunction.

Opinion of District Court of March 21, 1970

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

March 21, 1970

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

v.

School District Number One, Denver, Colorado, the Board of Education, School District Number One, Denver, Colorado, William C. Berge, individually and as President, Board of Education, School District Number One, Denver, Colorado, Stephen J. Knight, Jr., individually and as Vice President, Board of Education, School District Number One, Denver, Colorado, James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, individually and as members, Board of Education, School District Number One, Denver, Colorado; Robert D. Gilberts, individually and as Superintendent of Schools, School District Number One, Denver, Colorado,

Defendants.

Mr. and Mrs. Douglas Barnett, individually and on behalf of Jade Barnett, a minor, *et al.*,

Intervening Defendants.

Memorandum Opinion and Order

William E. Doyle, District Judge.

This is an action in which plaintiffs, parents of children attending Denver Public Schools, sue individually and on

behalf of their minor children. It is also brought on behalf of a class and has proceeded as a Rule 23 class action.

The complaint contains numerous causes of action and counts, but essentially it is complained that

(1) The Board of Education for School District No. One, Denver, unconstitutionally rescinded certain resolutions which were designed to desegregate specific schools within the District;

(2) The named defendants have created and/or maintained segregated student bodies and faculties in many of the schools in School District No. One;

(3) The said School District has provided an unequal educational opportunity to students attending segregated schools within the District.

Plaintiffs pray for a declaratory judgment that the above acts are unconstitutional and also seek broad injunctive relief prohibiting the defendants from continuing their prior policies and requiring them to remove the effects of their unconstitutional acts.

In July 1969, an extensive trial was had on plaintiffs' motion for a preliminary injunction as to their first claim for relief, which claim alleged that the rescission of the remedial School Board Resolutions 1520, 1524 and 1531 was an unconstitutional act. This Court held that this attempted rescission was in fact unconstitutional, and ordered that specified portions of Resolutions 1520, 1524 and 1531 be effectuated pending full trial on the merits. Keyes v. School District No. 1, Denver, Colorado, 303 F.Supp. 279 (D.Colo.), Supplemental Findings and Conclusions, 303 F.Supp. 289 (D.Colo. 1969).

In February 1970, the case was tried on its merits. The plaintiffs, the defendants and the intervening defendants were fully heard. This was a trial which continued for fourteen trial days. It produced over 2,000 pages of testimony and several hundred exhibits. Thus, the case has been fully tried with the exception of submission by the parties of tangible plans. This phase of the case was deferred pending decision on the issues involving alleged discrimination.

Plaintiffs' first claim for relief deals solely with the purpose and effect of the rescission of Resolutions 1520, 1524 and 1531. Plaintiffs' second claim for relief consists of three counts.[1] The first count of the second claim alleges that the Board of Education has purposely created and/or maintained racial segregation in certain schools within the District through boundary changes, school site selection and the maintenance of the neighborhood school policy. The second count alleges that the segregated schools within the District are grossly inferior and provide an unequal educational opportunity for minority students; that these schools do not even meet the separate but equal standard of Plessy v. Ferguson and that the Board is obligated to remedy this inequality regardless of its cause.

Finally, plaintiffs contend that several schools were created and/or maintained as segregated schools by actions of the Board, and that regardless of purpose or intent these acts are unconstitutional. We will deal first with the schools which were the subject of the preliminary hearing, considering the explanatory evidence offered at trial. Secondly, we will consider the evidence which has been offered relative

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[1] The plaintiffs' fourth count of the second claim for relief, based upon maintenance of a "track system," has been abandoned.

to segregation and discriminatory educational opportunity in the core city schools and, finally, we will discuss possible remedies.

I.

Plaintiffs' first claim for relief alleges that the rescission of School Board Resolutions 1520, 1524 and 1531 was unconstitutional because its purpose and effect was to perpetuate racial segregation in the affected schools. This claim for relief was the subject of the hearing on plaintiffs' motion for preliminary injunction.

Resolutions 1520, 1524 and 1531, promulgated in 1969, were designed to relieve segregation and the tendency toward segregation in schools located in the Park Hill area of Northeast Denver. These schools include Barrett, Stedman, Hallett, Smith, Phillips and Park Hill Elementary Schools; Smiley and Cole Junior High Schools; and East High School.

The evidence presented at the preliminary hearing has been fully incorporated in the present record. We deem it unnecessary to describe it in detail since it is fully set forth in 303 F.Supp. 279, 289. A recap will, however, serve to bring those proceedings into context.

Prior to 1950, the Negro population of Denver was concentrated in a portion of the city known as "Five Points," which is located west of Park Hill. Beginning in 1950, the Negro population began an eastward migration which, by 1960, had reached Colorado Boulevard, a natural dividing line. Since 1960, this migration has extended east of Colorado Boulevard into Park Hill. It is the acts of the defendants, taken in the face of this population movement, which plaintiffs contend created the *de jure* segregation complained of in the first claim for relief.

Barrett Elementary School was opened in 1960 at East 29th Avenue between Jackson Street and Colorado Boulevard. The site selected for Barrett, along with the size of the school and its established boundary lines insured that it would be a segregated school from the date of its opening.[1] From these and other facts, we concluded at the preliminary hearing, and we now affirm that holding, that the School Board intended to create Barrett as a segregated school and prevent Negro children from attending the predominantly Anglo schools east of Colorado Boulevard.

At trial (on the merits) defendants attempted to justify Barrett on the ground that until 1964 the Board maintained a racially neutral policy. Racial and ethnic data were not maintained by the District, and race was not considered as a factor in any decision. Defendants further stated that (1) the Barrett site had been owned by the District since 1949 and a school was needed in that general vicinity; (2) Colorado Boulevard was established as the eastern boundary of the Barrett attendance zone because it was a six lane highway and would have been a safety hazard were children required to cross it; and (3) Barrett was built relatively small because its main function was to relieve overcrowding in existing schools rather than to accommodate any significant projected increase in area population.

The above factors fail to provide a basis for inferring that a justifiably rational purpose existed for the action taken with respect to Barrett. *First*, the District owned other sites east of Colorado Boulevard.[2] Had a school been

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[1] When Barrett opened in 1960, its student body was 89.6 percent Negro.

[2] Dr. Oberholtzer testified that at the time Barrett was built, the School District also owned sites at 35th and Dahlia and 36th and Jasmine (Tr. pg. 2084).

built on one of these sites, it would have not only served the Barrett area, it would also have been integrated. *Second*, the fact that in 1960 many elementary school subdistricts included areas on both sides of busy thoroughfares indicates that safety was not a primary factor in setting school boundaries.[4] *Third*, because of Barrett's small size and the location of its subdistrict boundaries, Barrett relieved overcrowding only at the two predominantly Negro elementary schools west of Colorado Boulevard while affording no relief to the overcrowded Anglo Stedman elementary school eight blocks east of the Barrett site. *Finally*, at the time the decision to build Barrett at 29th and Jackson was made public, a large portion of the Negro community opposed the plan on the ground that Barrett would clearly be a segregated school. This opposition was made known to the Board, and, thus, the School Board cannot now claim that it was uninformed as to the racial consequences of its decisions. Indeed, at that time it was the view of the school administration that it was precluded from taking action which would have an integrating effect.

Between 1960 and 1965, several boundary changes were made in the Park Hill area and mobile units were employed

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[4] For example, in 1960, the attendance areas of the following elementary schools included areas on both sides of the indicated thoroughfares: Teller and Steck (Colorado Blvd.); Albion, Park Hill, Teller, Stevens, Wyman, Emerson, Evans, Greenlee, Cheltenham, and Colfax (Colfax Ave.); Crofton and Ebert (Broadway); Columbian, Cheltenham, Eagleton and Barnum (Federal Blvd.). Furthermore, it was the policy of the Board to place an elementary school at the center of its attendance area wherever possible. This policy was clearly ignored in the case of Barrett.

in some Park Hill schools to relieve overcrowding.[5] The effect of these various acts on the racial composition of Park Hill schools was identical. Each tended to isolate and concentrate Negro students in those schools which had become segregated in the wake of Negro population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white. From this uniform pattern we concluded that the School Board knew the consequences and intended or at least approved of the resultant racial concentrations. We find nothing in the evidence presented at the trial which detracts from this conclusion.

As noted in our former opinion, in 1962 a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (Voorhees Committee) was created. Following a thorough study, the Committee recommended that the School Board consider racial, ethnic and socio-economic factors in establishing boundaries and locating new schools, and that boundaries be set so as to establish heterogeneous school communities. Pursuant to this recommendation, the Board adopted Policy 5100, which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population.

A second study committee (Berge Committee) was established in 1966 to examine the policies of the Board with respect to the location of new schools in Northeast Denver and to suggest changes which would lead to integration of

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[5] The 1962 and 1964 boundary changes affected Stedman, Hallett, and Phillips schools. Mobile units were added to Stedman in 1964 and 1965 and to Hallett in 1965. For a more complete discussion as to the consequences of these boundary changes and mobile units see our opinions on plaintiffs' motion for preliminary injunction, reported at 303 F.Supp. 279 and 303 F.Supp. 289.

student population in Denver schools. This committee recommended that no new schools be built in Northeast Denver; that a cultural arts center be established which would be attended by students from various schools on a half-day basis once or twice a week; that educational centers be created; and that a superior school program be initiated for Smiley and Baker junior high schools.

After more than six years of studying and discussing these committee reports and recommendations, the Board in 1968 passed the "Noel Resolution" (Resolution 1490). The "Noel Resolution" noted that Policy 5100 recognized that continuation of neighborhood schools had resulted in the concentration of minority racial and ethnic groups in some schools within the District and that these schools provided an unequal educational opportunity. The Resolution directed the Superintendent of Schools to submit to the Board a comprehensive plan for the integration of the Denver Public Schools.

Pursuant to the "Noel Resolution's" directive, the Superintendent submitted a report entitled "Planning Quality Education—A Proposal for Integrating the Denver Public Schools." Between January and April 1969, the Board studied the Superintendent's report and passed three resolutions—1520, 1524 and 1531. These Resolutions were the product of intense study and discussion and were developed only after considering some fourteen alternative plans. Basically, their purpose was to eliminate segregation in the Negro schools in Park Hill while stabilizing the racial composition of schools in transition. Thus, these Resolutions constituted the first acts of departure from the Board's prior undeviating policy of refusing to take any positive

action which would bring about integration of the Park Hill schools.[6]

In May 1969, a School Board election was held. Much of the campaign revolved around Resolutions 1520, 1524 and 1531, especially those portions which called for mandatory bussing to relieve segregation. The two candidates who had pledged to rescind Resolutions 1520, 1524 and 1531 were elected. On June 9, 1969, the three Resolutions were rescinded and in their stead the Board passed Resolution 1533, which sought to achieve desegregation on a voluntary basis.[7] The rescissions were effectuated with little study and were justified only as a response to the community sentiment expressed in the School Board election.

We concluded at the hearing on preliminary injunction that the adoption of Resolutions 1520, 1524 and 1531 was a "bona fide attempt of the Board to recognize the constitutional rights of the persons affected by the prior segregation." 303 F.Supp. at 295. We further concluded, on the other hand, that the act of the Board repudiating these salutary policies was a legislative act and one of *de jure* segregation.

> The rescission of Resolutions 1520, 1524 and 1531 was a legislative act which had for its purpose restoration

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[6] To be sure, the Board had adopted statements of policy, such as Policy 5100, suggesting that it had abandoned its prior philosophy. However, Resolutions 1520, 1524 and 1531 marked the first time the Board had backed up earlier policy statements with affirmative action.

[7] Resolution 1533 provided for a voluntary exchange program at Hallett Elementary School on a reciprocal basis, i. e., a volunteering pupil from Hallett could transfer to another school *if* a pupil from that school would volunteer to attend Hallett. The Resolution also called for the transfer of 120 Stedman students, on a voluntary basis, to other elementary schools where space was available.

of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void. 303 F.Supp. at 295.

At trial defendants claimed that the three Resolutions had not been implemented at the time of the rescission, and thus in effect that no rights had ever vested under them. Yet the only apparent purpose of the rescission was to maintain a segregated condition at those schools which, but for the rescission, would have been afforded considerable relief. True, the resolutions had not been carried out, but extensive preparations were in progress. In any event, this cannot be made to turn on any property right analogy. Plaintiffs were deprived of a right to seek and possibly to attain equality.

Our preliminary injunction ordered full implementation of Resolutions 1520, 1524 and 1531, except to the extent that the Resolutions apply to East High School and Cole Junior High School. We now hold that the rescission as it applied to East and Cole was also unconstitutional. The School Board recognized that East High School contained growing numbers of minority pupils and that this rapid advance toward segregation threatened the high quality of education which had always been characteristic of East High School. It was, therefore, considered desirable to reduce the number of minority students at East and to stabilize the racial composition therein.[8] Although East may not now be a segregated school, it is unquestionably a

[8] Prior to the passage of Resolution 1520 the racial composition at East was approximately 54 percent Anglo, 40 percent Negro and 7 percent Hispano. The effect of the resolution would be to reduce minority enrollment at East to 32 percent.

school in transition. Left alone it will quickly become segregated. The School Board, with the passage of Resolution 1520, was administering preventive justice. It was making a reasonable and good faith effort to prevent East from becoming a segregated school.

Even though the racial composition at Cole Junior High School was not significantly changed by Resolution 1524, the Resolution did reduce the pupil membership at that school by 275 students. The purpose of this change was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the Board to improve the quality of education at the predominantly Negro Cole. The action of the Board in aborting and frustrating this effort cannot stand.

We conclude then that the effect of the rescission of Resolution 1520 at East High was to allow the trend toward segregation at East to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational effort there. It perhaps looked to ultimate desegregation. We must hold then that this frustration of the Board plan which had for its purpose relief of the effects of segregation at Cole was unlawful. Resolutions 1520 and 1524, as they apply to East and Cole, should be implemented.

In reaching the above conclusion, we have very carefully considered both the majority and minority opinions in the now famous Supreme Court decision of Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), and have concluded that both opinions fully support the position which we have taken.

It will be recalled that *Mulkey*, like the case at bar, had to do with the repeal of legislative acts which recognized rights guaranteed by the equal protection clause of the Fourteenth Amendment. These were in the form of California statutes prohibiting the denial by individuals of the right to be free and equal regardless of race. The plaintiffs were tenants in apartment buildings, who were denied accommodations. By initiative a constitutional amendment, Proposition 14, was adopted. This seemingly innocuous provision guaranteed to everyone unlimited right to decline to sell or rent his property in his uncontrolled discretion. Thus, Proposition 14, or Article I, Section 26, effectively repealed the statute relied on by plaintiff.

The Supreme Court struck down the California amendment adopted by popular vote and did so despite its neutral visage. The Court held that it had the effect of involving the state in "private racial discriminations to an unconstitutional degree." The majority opinion of Mr. Justice White, in concluding that this was discriminatory state action, said:

> None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court be-

lieves that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned. 387 U.S. at 380-381, 87 S.Ct. at 1634.

Our case is like *Mulkey* in that it also involves repeal or rescission of a previous enactment which extended and upheld non-discriminatory rights. Our case is stronger than *Mulkey* in that there the statute was brought to bear on private transactions. Here, on the other hand, there can be no question about whether it is the state which is discriminating.

The sole basis for the dissenting opinion of Justice Harlan was that the constitutional provision was not state action; that it was merely a proclamation of state neutrality in transactions private in nature. The opinion of Mr. Justice Harlan states:

> In the case at hand California, acting through the initiative and referendum, has decided to remain 'neutral' in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California

Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination. 387 U.S. at 389, 87 S.Ct. at 1638.

It cannot be argued in the case at bar that the legislative action of the School Board was neutral. The Board specifically repudiated measures which had been adopted for the purpose of providing a measure of equal opportunity to plaintiffs and others. The School Board action was, to say the least, not neutral and the causal relation between the School Board action and the injuries is direct. We find and conclude then that *Mulkey* not only supports our position, it is a compelling authority in support of the conclusion which we have reached. It is so closely analogous that we would be remiss if we failed to follow it.

II.

The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. For one thing, the concentrations of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.

Still another distinguishing point is that we do not here have legislative action similar to the rescission of Resolutions 1520, 1524 and 1531.

The first count of plaintiffs' second claim for relief alleges that *de jure* segregation exists at Manual High School; Cole Junior High School; Morey Junior High School; Boulevard Elementary School; Columbine Elementary School and Harrington Elementary School as a result of School Board action designed to isolate Negro and Hispano children in the above schools. Furthermore, plaintiffs claim that this intentional isolation of minority children aggravated or produced the segregated condition of the schools in question.

In support of their allegations, plaintiffs have offered boundary changes and other acts on the part of the School Board as constituting *de jure* segregation.

Before discussing the acts which are relied on, one other factor needs to be mentioned. In some of the schools there are concentrations of Hispanos as well as Negroes. Plaintiffs would place them all in one category and utilize the total number as establishing the segregated character of the school. This is often an oversimplification (certainly if relief is to be granted in a school, the Hispano should receive the same benefit as the Negro.) The plaintiffs have accomplished this by using the name "Anglo" to describe the white community. However, the Hispanos have a wholly different origin, and the problems applicable to them are often different.

One of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination. However, whether it is permissible to add the numbers of the two groups together and lump them into a single minority category for purposes of classification as a segregated school remains a problem and a question.

It would seem then that to the extent that Hispanos, as a group, are isolated in concentrated numbers, a school in

which this has occurred is to be regarded as a segregated school, either *de facto* or *de jure*.

We turn now to a consideration of the evidence offered by plaintiffs regarding boundary changes and elimination of optional areas, which evidence is presented in support of their argument that *de jure* segregation exists in the affected schools. Our comments and legal conclusions will follow.

1. *New Manual High School* (Location: 1700 East 28th Avenue. Present Racial Composition: 60.2 percent Negro, 27.5 percent Hispano, 8.2 percent Anglo)

Both the old and the new Manual were and are located in the older part of the city. This is an area which has long been occupied by the Negroes and is now partly occupied by the Hispanos as well. In the very earliest days of Denver it probably had no racial or ethnic character, and before the Negroes it was in all likelihood occupied by laboring people of various national origins.

The Negro movement has always been eastward because this has been the only open corridor, and this continues to be the case. Plaintiffs' big complaint is that the school was built in this old location and was thus earmarked for minority occupants. However, we have to be mindful of the evidence that it was opened in 1953 at a time prior to Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we are told that this location had the consent of the people in the neighborhood. At that time there was much less concern about minority concentration. The community concern was with the nature and character of the new facility. In any event, the new Manual High School had the same attendance boundaries as the old. The eastern boundary of the mandatory Manual attendance zone was be-

tween Williams and High Streets, just one-half block east of the school site.[9]

In 1953, Manual was operating under its capacity, while East High School, to the southeast, was filled to capacity.[10] Although data is not available as to the 1953 Hispano enrollment at Manual, we know that in 1949-50 this figure was 23.5 percent. The Negro enrollment at Manual in 1953 was 35 percent. We can infer, therefore, that when new Manual opened in 1953, it was a minority school if Negroes and Hispanos are aggregated. Nearby East High School was predominantly Anglo, with a Negro enrollment of only two percent.

By 1956, Manual High School was 42 percent Negro. Whereas in 1953 the Williams-High boundary of the Manual attendance zone was approximately co-terminus with the easternmost point of Negro population movement, by 1956 the Negro population had expanded eastward to roughly York Street. In January 1956, the school administration recommended that the Manual boundary be moved east to York Street, thus including a portion of the former East-

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[9] The new Manual attendance area was irregularly shaped with its northern boundary at the city limits, its western boundary at the Platte River, and its southern boundary at 17th Avenue. Only the eastern boundary, between Williams and High Streets, is relevant for the purposes of this case.

[10] The capacity utilization of a school is a function of school size and number of students. Plaintiffs have computed school capacity by using the figure of 30 students per room multiplied by the number of rooms in the school. Defendants contend that this is unrealistic, because at lower achieving schools the student-teacher ratio has been reduced, so that, for example, 25 students per room may constitute capacity. Throughout this opinion, the lower achieving schools will be considered undercapacity only where the degree of undercapacity as represented by plaintiffs' data is so great that it cannot be explained purely in terms of a lower teacher-pupil ratio.

Manual optional zone.[11] This proposed boundary, therefore, coincided with the eastern movement of Negro population in that area.

The 1956 Manual boundary change was resisted by some members of the Negro community on the ground that it would serve to contain Negro students living between Williams and York at Manual by cutting off their prior option to attend East. This concern was communicated to the School Board at a series of public meetings. The school administration justified the change on the basis of the overcrowding at East and the underutilization at Manual. Manual had sufficient capacity to accommodate more students than those to be transferred under the proposed boundary change. It was, therefore, suggested that the Board move the Manual boundary east to Colorado Boulevard. This would have embraced a predominantly Anglo neighborhood. Such a move would not only have further alleviated overcrowding at East, but would also have had some integrating effect at Manual. How much we do not know. It would not have substantially changed its character, and the integrating effect would have been temporary, only because in a few years this neighborhood became Negro.

2. *Cole Junior High School* (Location: 3240 Humboldt Street. Present Racial Composition: 72.1 percent Negro; 25.0 percent Hispano; 1.4 percent Anglo)

In 1952, the eastern boundary of Cole Junior High was four blocks east of the school, between High and Race Streets.[12] At this time Cole was undercapacity while

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[11] East High School, at this time, had a Negro enrollment of one percent.

[12] Although there is no direct evidence of the racial composition of Cole in 1952, we may infer that it was a predominantly minority school at that time from the fact that in 1946-47 its racial composition was 43 percent Anglo; 21 percent Negro; 29 percent Hispano and 7 percent "Mongolian." By 1952 the Negro enrollment at Cole had increased to 30 percent.

Smiley Junior High, a predominantly Anglo school a short distance east of Cole, was overcapacity by approximately 300 students. Although the empty space at Cole would have been utilized to alleviate overcrowding at Smiley, this course of action was not taken.[13] Instead, the school administration determined to construct an addition at Smiley.

In 1956, a boundary change was proposed whereby the eastern boundary of Cole would be extended to York Street, thus transferring part of the Cole-Smiley optional zone to Cole.[14] This proposed change was criticized by members of the Negro community on the ground that its tendency was to preclude Negro students who were living between Race and York Streets from attending Smiley and would force them to attend Cole, which, by this time, was rapidly becoming a segregated school. Nevertheless, the Cole-Smiley boundary proposal was adopted. After the shift in the Cole boundary, Smiley remained overcapacity while Cole was substantially undercapacity.

In 1958, another addition was built at Smiley. As in 1952, this action was taken notwithstanding that empty spaces were available at Cole.

In March 1969, the School Board adopted Resolution 1524, which called for the reduction of student population at Cole. This action was designed to improve the educational opportunity offered to those students remaining at Cole,

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[13] This would presumably have entailed the transfer of Anglo students at Smiley to the predominantly minority Cole.

[14] This 1956 boundary change was allegedly made in response to the building of Hill Junior High School. However, the Hill attendance zone was carved out of the Smiley, Morey and Gove attendance zones and Cole did not play a significant part in the creation of the Hill area. It is also apparent that the Cole-Smiley boundary change of 1956 paralleled the Manual-East change of that same year, and the objections of many Negro leaders were the same with respect to both of these changes.

while making room for special education programs for low achieving students. Resolution 1524 was rescinded in June 1969.[15]

3. *Morey Junior High School* (Location: 840 East 14th Avenue. Present Racial Composition: 52.4 percent Negro; 26.8 percent Anglo; 18.6 percent Hispano)

The racial composition of Morey Junior High School in 1961 was between 65 and 80 percent Anglo. Morey was surrounded on four sides by optional zones. In 1962, the School Board adopted boundary changes which eliminated all but one of the Morey optional zones.[16] After this en-

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[15] We have determined in part I of this opinion that the rescission of Resolution 1524 was unconstitutional and that Resolution 1524 should be effectuated with respect to Cole. In this part of the opinion we are concerned only with whether further relief is warranted with reference to Cole.

[16] The 1962 changes involved transferring the Morey-Hill optional zone to Hill; the Morey-Byers optional zone to Byers; the Morey-Cole optional zone to Morey; and the Baker-Morey optional zone to Morey. The racial composition of each of these areas, as reflected by 1960 census tract data, is roughly as follows:

A. Morey-Hill optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano

B. Morey-Byers optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano

C. Morey-Cole optional zone—10 percent to over 50.1 percent Negro (with the larger portion over 50.1 percent Negro), 3.1 to 10 percent Hispano

D. Baker-Morey optional zone—0 to 3 percent Negro, 10.1 to 25 percent Hispano

Also, a portion of the Cole Junior High mandatory zone was transferred to Morey, the racial composition of this area being over 50.1 percent Negro and 3.1 to 10 percent Hispano.

A particularly strong protest with respect to the above boundary changes was voiced by parents of Anglo children living between 6th and 8th Avenues in a mandatory Morey attendance zone. They asserted that these changes would transform Morey into a minority school. In response to this protest the School Board also transferred this area between 6th and 8th Avenues to Byers, a predominantly Anglo junior high school.

actment became effective, the estimated Anglo enrollment at Morey declined to between 45 and 49 percent. Thus, the 1962 Morey boundary changes were largely responsible for the transformation of Morey from a predominantly Anglo school in 1961 to a predominantly minority school in 1962.

The defendants' testimony was to the effect that these changes were made in order to better utilize the capacities of Hill, Byers and Baker junior high schools. The testimony also showed that at that time Cole Junior High School, which was then predominantly Negro, was overcapacity and Morey was the most convenient school available for the purpose of accomplishing the objective. The effect, of course, was to relieve somewhat the concentration of Negroes at Cole, while substantially increasing the number of Negroes at Morey.

Undoubtedly, it is possible that the Board could have worked out a more equitable distribution, but it cannot be said that this was carried out with the design and for the purpose of causing Morey to become a minority school. The Board could not have escaped criticism for the plaintiffs if it had continued the concentration of Negroes at Cole rather than transferring them to Morey.

4. *Boulevard Elementary School* (Location: 2351 Federal Boulevard. Present Racial Composition: 68.1 percent Hispano, 29.9 percent Anglo)

In 1961, Boulevard Elementary School was undercapacity and its racial composition was 59 percent Anglo and 40 percent Hispano. Brown Elementary School, five blocks west of Boulevard, was operating at approximately full capacity and was 98 percent Anglo. Ashland Elementary School, northeast of Boulevard, was operating at its capacity and was 61 percent Anglo and 37 percent Hispano. The razing of a portion of Boulevard resulted in a de-

crease in that school's capacity, requiring the administration to adjust the Boulevard boundaries. The western portion of the Boulevard subdistrict was transferred to Brown and the southwest part of the Ashland attendance zone was assigned to Boulevard. As a result of these boundary alterations, the Hispano population of Boulevard was increased to 60 percent while reducing the Anglo enrollment to 39 percent, thus transforming Boulevard from a predominantly Anglo to a predominantly Hispano school. The school administration denied that this decision had any racial or ethnic character, maintaining that it was a matter of necessity because of the age and condition of the building destroyed.

5. *Columbine Elementary School* (Location: 2545 East 28th Avenue. Present Racial Composition: 97.2 percent Negro; 2.2 percent Hispano; .6 percent Anglo)

In 1951, Columbine Elementary School was overcapacity and its Negro enrollment was 24 percent. Harrington Elementary was slightly overcapacity and had no Negro students. Stedman Elementary School, which has been considered in part I of this opinion, at 29th and Dexter, was operating slightly under its capacity and also had no Negro students.

Three optional zones were established around Columbine in 1952—Columbine-Harrington; Columbine-Mitchell; and Columbine-Stedman. The asserted purpose of this action was to relieve overcrowding at Columbine. However, since both Harrington and Stedman were operating at approximately their capacity prior to the creation of the optional zones, the effect of the administration's action was to slightly decrease overcrowding at Columbine while creating an overcrowded situation at Harrington and Stedman. Furthermore, a study of the racial composition of

these schools one year after the creation of the optional zones indicated that the options were apparently employed by Anglo students as a means of escaping from Columbine to the almost totally Anglo Harrington and Stedman.[17]

Before considering the legal consequences of the above discussed actions of the School Board, there are some other facts which should be mentioned. Former Superintendent Oberholtzer testified at great length to the fact that the administration, including the Board, followed a policy of strict neutrality as far as segregation or integration was concerned. Indeed, Superintendent Oberholtzer stated that even after the decision in Brown v. Board of Education, *supra*, he was of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration. Thus, it was his belief that he was committed to maintaining the status quo in the schools. Other members of the Board also denied vigorously that they had ever been motivated by either an intention or desire to discriminate. Their testimony was that the boundary changes and their other actions were taken in order to utilize school capacities and carry out the neighborhood school concept.

In examining the boundary changes and removal of optional zones in connection with the several schools which are discussed above, we do not find any wilful or malicious actions on the part of the Board or the administration (in relationship to elementary schools). As to these schools, the result is about the same as it would have been had the

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[17] Between 1951 and 1952, the Negro enrollment at Columbine jumped from 24 percent to 31 percent, while there was no significant increase in Negro enrollment at either Harrington or Stedman. Between 1952 and 1955, the Negro enrollment at Columbine increased 38 percent.

administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well, always seem to end up in isolation. The substantial factor in this condition is twofold: First, a failure on the part of the Board or of the administration to take any action having an integrating effect, and secondly, deeply established housing patterns which have existed for a long period of time and which have been taken for granted.

It should also be kept in mind that prior to Brown v. Board of Education, *supra*, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the Board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it.

Under the present state of the law, particularly in the Tenth Circuit, a condition such as we have described above does not dictate the conclusion that this is *de jure* segregation which calls for an all-out effort to desegregate. It is more like *de facto* segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance.

It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding.

From the cases, we gleaned the following principles as essentials of *de jure* segregation:

(1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

(2) this action must have in fact created or aggravated segregation at the school or schools in question;

(3) a current condition of segregation must exist; and

(4) there must be a causal connection between the acts of the school administration complained of and the current condition of segregation.

The first of the above requirements actually consists of two elements—state action and a purpose to segregate. It seems unnecessary to elaborate on the element of state action at this time, since plaintiffs here emphasize only affirmative official acts.

The important distinguishing factor between *de facto* and *de jure* segregation is purpose to segregate. *See, e. g.*, Board of Education, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931, 87 S.Ct. 2054, 18 L. Ed.2d 993 (1967); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). As the Court of Appeals for the Tenth Circuit stated in *Dowell, supra*:

> In Downs the trial court found the plan was not being used to deprive students of their Constitutional rights and here the trial court, in substance, found to the contrary. It is still the rule in this Circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principle or deprive certain classes of individuals of their Constitutional rights. 375 F.2d at 166.

Segregative purpose may be overt, as in the dual system maintained in some states prior to Brown v. Board of Education, *supra*, or it may be covert, in which case purpose normally must be proved by circumstantial evidence. In order to satisfy this element of purpose, the intent to segregate need not be the sole motive for a school district's action; it need only be one of several factors which motivated the school administration. Thus, regardless of how this purpose is manifested, it is clear that:

> the constitutional rights of children not to be discriminated against in school admission on grounds of race or color * * * can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "geniously or ingenuously" Cooper v. Aaron, 358 U.S. 1, 17, 78 S.Ct. 1401, 1409, 3 L.Ed.2d 5, 19 (1958).

The second requirement, assuming purposeful state action, is that the act or acts must have resulted in or substantially aggravated segregation. A threshold problem here is a definition of "segregation." This term connotes first and foremost a very heavy concentration of a minority group within the school in question. Once you have a predominantly minority school population, other factors come into consideration. For example, the racial and ethnic composition of faculty and staff, *e.g.*, Bradley v. School Board, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); Hobson v. Hansen, 269 F.Supp. 401, 502 (D.D.C. 1967), aff'd. *sub nom.*, Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); the equality of educational opportunity offered at the school; and the community and administration attitudes toward the school.

The third requirement, that a condition of segregation presently exists, recognizes the fact that the term "*de jure* segregation" speaks in present terms. In other words, if a past condition of segregation has been remedied, either through positive state action or through the natural course of events, there is, of course, no present injury justifying equitable relief.

The final and most important element in this case is that of a causal relationship between the discriminatory action complained of and the current condition of segregation in the school or schools involved. Thus, it would be inequitable to conclude *de jure* segregation exists where a *de jure* act had no more than a trifling effect on the end result which produced the condition.[18] In such a case no relief can be granted, for it is not the duty of a court of equity to punish a school board for all past sins, but rather to afford a remedy only where past sins have resulted in present injury.

This necessity of a causal connection between present injury and past discriminatory acts was recognized in Hobson v. Hansen, *supra*. Prior to 1954 the District of Columbia schools had been segregated by law. In 1954 a neighborhood policy was adopted in the District. At the time the *Hobson* case was instituted, substantial desegregation had not been achieved. Plaintiffs, therefore, contended

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[18] Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation. Thus, in part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose for the rescission of Resolutions 1520, 1524 and 1531.

that the effects of the dual system still remained and that they were entitled to relief. Judge Wright held that the dual system was insignificant as a cause of the present segregation:

> This suit was begun 12 years after the institution of the neighborhood school policy, * * *. Many concurrent causes have combined with the Board's 1954 decisions in the evolution of present reality. If the segregation in the District's schools is not currently objectionable under either an independent *de facto* or *de jure* rationale, it would be very difficult to strike it down merely because the neighborhood school policy failed to produce sufficient integration when it replaced an overt *de jure* system 13 years ago. 269 F.Supp. at 495.

So also in our case, the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits.

Plaintiffs have argued that the construction of the new Manual in 1953 at the old site virtually insured its segregated character and that this act, as well as the Manual and Cole boundary changes, together with the Smiley additions at a time when Cole was undercapacity, are acts of *de jure* segregation. Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion.

It can, however, be concluded that the segregation (or racial concentration) which presently exists at Manual and Cole, except insofar as Cole was affected by Resolution 1524 and its rescission as explained above in part I, is not *de jure*. How much of an impact the Board's decisions at

the time had on minority concentrations we do not know. We do know that much of the concentration occurred long after these decisions were made. For example, the Negro population at Cole and Manual increased over 20 percent between 1963 and 1968, and the only contribution which the Board could have made to that resulted from inaction. An essential requisite of a violation of the equal protection clause of the Constitution in the present context is positive legislative or administrative state action which discriminates on account of race, and which produces the condition complained of. The instant situation then cannot be placed at the administration doorstep; if cause or fault has to be ascertained it is that of the community as a whole in imposing, in various ways, housing restraints.

Similarly, it is doubtful whether the 1952 boundary change at Columbine can now be classified as a *de jure* act. To be sure, it increased the minority concentration at Columbine; yet there is a dearth of evidence that this was accompanied by a purpose to segregate rather than a purpose to eliminate double sessions, which was also a result of the change. In any event, as in the case of Manual and Cole, this act appears in restrospect to have had little to do with the present minority population at Columbine. Between 1953, the year following the Columbine boundary modification, and 1969, the percentage of Negro enrollment at the school more than doubled. Even the 1960 census tract data shows that almost the entire Columbine subdistrict was in an area with over 50.1 percent Negro population. It is not conceivable then that this 1952 boundary change, the immediate effects of which were relatively insignificant, could be a current cause of segregation at Columbine.

The Boulevard boundary change of 1962 was necessitated by the legitimate need to reduce pupil enrollment due to

the razing of a portion of the school. Furthermore, there is absolutely no evidence presented, other than the fact of the 1962 change, upon which to base a finding that the School District was motivated by an intent to segregate Hispano students at Boulevard Elementary School.

The removal of the Morey Junior High School optional zones in 1962 did have the effect of increasing the concentration of minority students at that school. It also had the salutary effect of relieving the concentration of Negro students at Cole, a result consistent with defendants' claim that it was carrying out a racially neutral policy. Both the desirable and undesirable consequences of the 1962 changes appear to have been by-products of a general redistribution. In view of that, it would strain both the facts and law to say that the administration acted with an unlawful purpose or design in this instance.

Moreover, whether Morey is presently a segregated school remains a question. To so categorize it requires the lumping together of all non-Anglo groups. The current racial composition at Morey is 52.4 percent Negro, 26.8 percent Anglo, 18.6 percent Hispano. Over 80 percent of the classroom teachers at Morey are Anglo. Morey is unquestionably racially imbalanced, is in transition and will offer a concentration problem unless the Board acts to stabilize it.

Plaintiffs' further claim is that the neighborhood school policy itself has been maintained by the School Board for the purpose and with the effect of segregating minority pupils to the degree that it is unconstitutional. They rely on the rulings of our Court of Appeals that the deliberate use of a neighborhood school system to perpetuate segregation is unlawful. Board of Education, etc. v. Dowell, 375 F.2d 158 (10th Cir. 1967), cert. denied, 387 U.S. 931, 87

S.Ct. 2054, 18 L.Ed.2d 993 (1967); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). What we have said above regarding boundary changes disposes of this contention. There is no comprehensive policy apparent other than the negative approach which has been described which could be considered in this context. The Board's eye-closing and head-burying is not the kind of conduct which the Circuit Court had in mind in *Dowell* and *Downs*.

Finally, the third count of plaintiffs' second claim for relief urges us to adopt a rule of law that a neighborhood school policy may in and of itself create and/or maintain unconstitutional segregation, even if the adoption of such a policy is motivated by legitimate factors. Plaintiffs' argument in essence is that the neighborhood school system is unconstitutional if it produces segregation in fact. We recognize that some courts have moved along this line.[19] However, the law in our Circuit, as enunciated in *Downs* and *Dowell, supra*, is that a neighborhood school policy, even if it produces concentration, is not *per se* unlawful if:

> it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination. Board of Education, etc. v. Dowell, 375 F.2d 158, 166 (10th Cir. 1967).

The United States Supreme Court has not yet ruled on this question, and we are here subject to the strong pronouncements of our Circuit Court. Under these decisions

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[19] Hobson v. Hansen, 269 F.Supp. 401 (D.D.C.1967), *sub nom.*, Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D. Mass.1965), vacated, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Education, 226 F.Supp. 208 (E.D.N.Y.1964); Branche v. Board of Education, 204 F.Supp. 150 (E.D.N.Y.1962).

plaintiffs are not entitled to relief merely upon proof that *de facto* segregation exists at certain schools within the School District.[20]

In summary then, we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation.

III.

The third count of plaintiffs' second claim for relief alleges that defendants are maintaining certain schools within the District which provide an unequal educational opportunity for the students attending them; that these are segregated schools;[21] and that, therefore, the students at these schools are being denied the equal protection of the law. The plaintiffs seek relief for a large number of schools at every level and in various conditions of racial concentration. These include Barret, Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman, Whittier, Wyatt and Wyman Elementary Schools; Baker, Cole, Morey and Smiley Junior High Schools; and East, Manual and West High Schools.[22]

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[20] There is no discernible difference in result between the *de facto* and *de jure* varieties. Both produce the same obnoxious results, but the Supreme Court has so far given its attention to the more serious problem of dual schools.

[21] Plaintiffs contend that where, as here, it is claimed that schools provide an unequal educational opportunity, it is irrelevant whether the schools in question are *de jure* or *de facto* segregated. This point is discussed later in this section.

[22] These schools were selected by plaintiffs through use of probability theory. Thus, they claim that if all children were picked at

In addition to the charge that all these schools are segregated,[23] plaintiffs maintain these are inferior schools and that racial concentration produces the inferiority. They use several indicia to establish the inferiority and inequality. All of these schools, they say, have (1) low average scholastic achievement; (2) less experienced teachers; (3) higher rates of teacher turnover; (4) higher dropout rates; and (5) older buildings and smaller sites.

Extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools. Some of these have high concentrations of either Negroes or Hispanos. Others are substantial, but at the same time relatively marginal in this regard.

It is clear that there is a relationship between racial concentration and inferiority in achievement and low standards and consequently low morale. However, our mission is to determine inequality based upon race or ethnic origin, we cannot undertake to cure all other ills which we might encounter here. The plaintiffs, of course, believe that all injustices ever encountered should be rooted out. Tentatively, at least, we have determined that for the present purpose a concentration of either Negro or Hispano

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random to attend each school in the District, the probability that the present racial composition would result at each of the above schools is phenomenally low. We do note that the schools selected through this procedure are generally those with the highest concentration of minority students in the District.

[23] Some of the above schools (Barrett, Smiley and East) have been considered, and full relief has been granted, in part I of this opinion. However, since these schools (with the exception of East) were clearly segregated before this suit was instituted, the statistical data on the educational opportunity provided by them prior to their desegregation has some relevance in creating an overall picture as to the effect of segregation on educational opportunity, and hence it is included in the findings of fact which follow.

students in the general area of 70 to 75 percent is a concentrated school likely to produce the kind of inferiority which we are here concerned with.

In the columnar list below, the elementary, junior and senior high schools with respect to which the plaintiffs have presented evidence are shown. It is to be noted that some of these schools are subject to the findings and conclusions contained in part I of this opinion, but they are nevertheless included here because of their racial concentrations, if not in every instance their educational inferiority.

ELEMENTARY SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
*Barrett	67.0	30.5	1.4
Boulevard	29.9	.5	68.1
Bryant-Webster	23.3	.5	75.5
Columbine	.6	97.2	2.2
Crofton	7.3	38.4	51.5
Ebert	10.6	34.6	52.4
Elmwood	7.9	00.0	91.6
Fairmont	19.8	00.0	79.9
Fairview	7.0	8.2	83.2
Garden Place	17.0	17.2	64.7
Gilpin	3.2	36.4	59.4
Greenlee	17.0	9.0	73.0
Hallett	38.2	58.4	2.6
Harrington	2.2	76.3	19.6
Mitchell	2.2	70.9	26.7
Smith	4.0	91.7	3.3
Stedman	4.1	92.7	2.7
Whittier	1.4	94.0	4.5
Wyatt	1.9	46.4	51.5
Wyman	27.5	38.0	29.7

JUNIOR HIGH SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
Baker	11.6	6.7	81.4
Cole	1.4	72.1	25.0
Morey	26.8	52.4	18.6
*Smiley	61.2	30.4	6.9

*Barrett and Smiley have been integrated by the preliminary injunction.

SENIOR HIGH SCHOOLS

School	Anglo (%)	Negro (%)	Hispano (%)
East	50.1	39.9	7.4
West	56.6	9.0	34.0
Manual	8.2	60.2	27.5

Based on the rule of thumb adopted above, we are here primarily concerned with the following schools: Bryant-Webster, Columbine, Elmwood, Fairmont, Fairview, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman and Whittier Elementary Schools; Baker and Cole Junior High Schools; and Manual High School.

A. *Achievement*

Plaintiffs' evidence establishes that the scholastic achievement in the above schools is significantly lower than in the other schools in the city. To evidence this, they point to the 1968 Stanford Achievement Test results, which results are designed to measure the achievement level of each pupil in specific scholastic areas, such as spelling, arithmetic, and science. Achievement data for elementary, junior and senior high schools appears in Appendix I.

At the elementary school level, these Stanford Tests results are reported in terms of grade level scores for the third and fifth grades in May 1968. Since May 1 marks the approximate date at which the eighth month of school begins, we are told that a third grade student should be achieving at a 3.8 level at this time, while a fifth grade student should be achieving at a 5.8 level.

We find that in May 1968, the children in the third grade at the segregated schools in question achieved at a grade level of approximately 2.96, and accordingly, were almost one full year below the level at which they should have been achieving. With respect to all 91 schools in the District in 1968, the average median grade level was 3.57, or approximately six months above the achievement level of the schools listed above.

Similarly, the average achievement among fifth grade students at the 12 segregated elementary schools was 4.30. All fifth graders in the District averaged 5.22, which is almost a full year ahead of the 12 segregated schools.

The data with respect to junior high schools, also shown in Appendix I, is based upon the May 1968 Stanford Achievement Tests, and is reported in terms of percentile scores (no grade placement scores were available for junior or senior high schools). A percentile score shows the percentage of pupils nationally whose scores are below the given percentile. For example, if a student's percentile score on a given test is 75, then 75 percent of the students in his grade nationally have scored lower on that test. Similarly, 25 percent of the students taking the test have scored higher.

The average percentile score for all ninth graders on all tests administered is 53.8. However, the two segregated junior high schools (Baker and Cole) achieved at an aver-

age percentile score of only 28.2. This is some 29 percentiles below the average percentile score among all ninth graders. It is interesting to note that the highest average percentile score of the two segregated junior high schools is lower than the lowest average percentile score at any of the other junior high schools in the city.

Senior high school data is based upon tests given in May 1968, to all eleventh grade students in the District, and, like the junior high school data, these scores are reported in terms of average median percentile.

The average median percentile score for all high schools at the eleventh grade level was 52. For Manual, the only minority concentrated high school, the average percentile score was 30. Thus, at the eleventh grade level Manual achievement was some 22 percentiles lower than the high school average for the city, and 70 percent of all students nationally performed better than the median at Manual.

B. *Teacher Experience*

Faculty experience is an important factor in determining the educational opportunity offered at a particular school, and plaintiffs have produced evidence which shows the percentage of faculty at a given school with (1) no years of prior Denver Public School experience; (2) probationary status (0-3 years of experience); and (3) 10 or more years experience. Teacher experience data for elementary, junior and senior high schools appears in Appendix II. At the elementary school level plaintiffs have compiled teacher experience data for their 20 target schools and 20 selected schools with high Anglo enrollment. We have here selected only those schools out of plaintiffs' list of target schools which we find to be segregated, and have compared teacher experience in them with teacher experience in plaintiffs' selected Anglo schools.

The evidence establishes that in the 12 segregated elementary schools in 1968, 23.9 percent of the teachers had no previous DPS experience, 48.6 percent were on probation and 17.4 percent had 10 or more years experience. In contrast, in the 20 selected Anglo schools, only 9.8 percent of the faculty had no previous experience, 25.6 percent were on probation and 47.1 percent—nearly half—had 10 or more years of experience. Of the 12 segregated elementary schools, only one—Bryant-Webster—had a higher percentage of teachers with 10 or more years experience than teachers with no experience or on probation, while sixteen of the 20 Anglo schools had more teachers with 10 or more years experience than non-experienced or probationary teachers.

As to junior high schools, plaintiffs have introduced teacher experience data on all junior high schools in existence in 1968 (see Appendix II). This evidence establishes that the segregated schools have more probationary and non-experienced teachers and fewer teachers with 10 or more years experience than the selected Anglo schools.

The data with respect to senior high schools is similar to that on junior high schools. As was the case with the junior high schools, there are more high school teachers with no or little experience and fewer with over 10 years at Manual than in other senior high schools.

C. *Teacher Turnover*

The effect of teacher turnover on the quality of educational opportunity is twofold. First, a high teacher turnover rate tends to have a disorganizing effect on the school in question. Furthermore, and more important, the teacher turnover rate in a particular school significantly affects the experience of the faculty at that school. In the present

case, plaintiffs have established that the present policy with respect to teacher transfers has the effect of creating a much higher turnover rate at predominantly minority schools than at predominantly Anglo schools. This in turn results in more faculty vacancies at these minority schools and the assignment to them of new teachers with little or no Denver Public School experience.

Denver Public Schools Policy 1617A deals with transfers for faculty. On or about April 20 of each year, the Assistant Superintendent for Personnel Services posts in each school a list of teaching vacancies to be filled the following school year. Those teachers who wish to transfer to schools with vacancies submit an application. Although the principal criterion for determining whether to grant an application for transfer is "whether the request will result in the best educational program for the School District," one of the major considerations for filling vacancies is seniority. Thus, teachers with the most seniority are normally given preference in making transfers. This transfer policy is embodied in an Agreement between School District Number One and the Denver Classroom Teachers Association.

This policy results in the more experienced teachers at minority schools transferring out of those schools when vacancies are opened at predominantly Anglo schools, with the resulting vacancies being filled by inexperienced teachers.

D. *Pupil Dropout Rates*

Plaintiffs' evidence as to dropout rates in junior and senior high schools[24] is set forth in terms of projected and

[24] Since, by law, it is mandatory that children attend school until the age of 16, there are no figures as to dropout rate with respect to elementary schools.

annual dropout rates. The annual dropout rate merely indicates the percentage of students who leave school during a given year. The projected dropout rate for a given year reflects the percentage of students beginning at a particular school who will drop out before graduation (see Appendix III).

The evidence tends to indicate that, generally, the dropout rate is higher at the two segregated junior high schools (Baker and Cole) and Manual Senior High School than at the other schools in the District.

E. *Building Facilities*

Plaintiffs have introduced evidence in an attempt to show a disparity in the age of school buildings and the size of school sites between predominantly minority and predominantly Anglo schools. We would agree that, in most general terms, this disparity exists. However, we do not think that the age of a building and site size are, in and of themselves, substantial factors affecting the educational opportunity offered at a given school. However, we do recognize that in schools which are segregated, have less experienced teachers and produce generally low achieving students, the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school.

The above material summarizes plaintiffs' evidence and our findings as to the objective indicia of inequality at the schools for which they seek relief. Although plaintiffs claim that factors such as inexperienced faculty tend to contribute to the inferior educational opportunity provided at these schools, their main argument is that the segregation which exists at many of these schools makes a major contribution to this inferiority.

Dr. Dodson, a professor of education at New York University, who has for the past 15 years studied the relationship between the scholastic performance of minority children and segregated schools, testified that a segregated school adversely affects a Negro child's ability to achieve. He indicated that studies show that by the time a school becomes segregated, it is looked upon by the whole community as being inferior.

At this point, the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance.

The defendants do not acknowledge that segregated schools per se produce lower achievement and an inferior educational opportunity. They point to other factors, such as home and community environment, socioeconomic status of the family, and the educational background of the parents as the major causes of inferior achievement. We do not disagree that these factors are relevant, but we cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity.

The first study of the equality of educational opportunity in the Denver Public Schools conducted by the Voorhees

Committee recognized this. In its 1964 report to the Board of Education this Committee stated that

> In a "neighborhood" school system one inevitable result of concentrations of races and ethnic groups because of housing patterns is concentrations of children in the schools into the same groups. There is abundant authority to the effect that "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. In addition, however, there is the fact that there is not available to many children (perhaps a majority of the total school population, regardless of race or ethnic background) the democratic experience of education with members of other races and groups with which they will have to live and compete. The responsibility to eliminate or reduce this result where possible and to compensate for it where elimination is not possible by the removal of prejudice (whether based on color, ethnic or religious background, false values, or any other cause) must be the responsibility of the school to its pupils. Voorhees Committee Report, pp. 6-7.

The Committee also said:

> In 1954 the United States Supreme Court stated that segregated education is inherently unequal education. There was then and is now ample authority for such a statement. While the Court in that instance was concerned with segregation established by law, the Committee is persuaded that the same statement can correctly be made where de facto segregation of minor-

ity races occurs because of other factors, the most obvious of which is a pattern of housing restriction. The Committee feels that in adhering without obvious deviation to the principle of establishing school boundaries without regard to racial or ethnic background, the Board and the administration have concurred, perhaps inadvertently, in the perpetuation of existing de facto segregation and its resultant inequalities in the educational opportunities offered. Voorhees Committee Report, pg. A-5.

As a result of the Voorhees Report, the School Board, on May 6, 1964, adopted Policy 5100 providing that henceforth the school administration would maintain statistical data on the racial and ethnic composition of students in the Denver Public Schools. In adopting the philosophy of the Voorhees Report the Board said:

> The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups in some schools. Reduction of such concentration and the establishment of heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity.

In 1966 the School Board again created a committee to investigate inequality of educational opportunity due to racial concentration in schools (the Berge Committee). The Committee's report is replete with references to the inferior education which results from segregation.

When we consider the evidence in this case in light of the statements in Brown v. Board of Education that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in

producing inferior schools and unequal educational opportunity.

The equal protection clause of the Fourteenth Amendment prohibits any state from denying to any person the equal protection of the laws. Simply stated, a state may not treat persons differently without a legitimate reason for doing so. In the area of economic regulation the courts grant broad leeway to the states in creating classes of individuals and treating them differently. All that need be shown is a minimal justification in terms of a legitimate state interest for the inequality of treatment.

The courts, however, have jealously guarded the rights of disadvantaged groups such as the poor or minorities, and have held that where state action, even if non-discriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the state provides a substantial justification in terms of legitimate state interest. See, *e. g.*, Griffin v. Illinois, 351 U.S. 12, 18 n. 11, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).[25] This general principle of consti-

[25] Under a claim for relief based upon separate-but-unequal school facilities, purpose or intent to discriminate is not a necessary factor. Where state action results in unequal treatment of the poor or minority groups, it is no defense that the state action was not taken with a purpose to injuriously affect only the poor or minorities as a class. *See* Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). *See also* Hobson v. Hansen, 269 F.Supp. 401, 497 (1967), which states:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

tutional law is fully applicable to school segregation cases. The present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools. As Judge Wright stated in Hobson v. Hansen, *supra*:

> Theoretically, therefore, purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb would raise a real constitutional question. But in cases not involving Negroes or the poor, courts will hesitate to enforce the separate-but-equal rule rigorously. * * * But the law is too deeply committed to the real, not merely theoretical (and present, not deferred) equality of the Negro's educational experience to compromise its diligence * * * when cases raise the rights of the Negro poor. 269 F.Supp. at 497.

As Judge Wright further pointed out in the *Hobson* case, *de facto* segregation today stands in the same position as did *de jure* segregation prior to Brown v. Board of Education. Under the old *Plessy* doctrine (Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)) a school board was under no constitutional duty to abandon dual school systems created by law so long as all schools were equal in terms of the educational opportunity offered. Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood

school system. However, if the school board chooses not to take positive steps to alleviate *de facto* segregation, it must at a minimum insure that its schools offer an equal educational opportunity.

The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the District.[26] (See page 78, *supra*, for a list of these schools.) The evidence establishes this beyond doubt. Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns.[27] It strikes one as incongruous that the community of Denver would tolerate schools which are inferior in quality.

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[26] This, of course, does not mean that we condemn in any way the leadership and educational efforts of the administration and faculty of these schools. Principals and teachers alike have put forth an outstanding effort to cope with the educational problems in their schools. However, until the underlying causes of these problems are removed, the work of these individuals can never be fully successful.

[27] We thus have a situation very similar to that found in Barksdale v. Springfield School Committee, 237 F.Supp. 543 (1965), vacated, 348 F.2d 261 (1st Cir. 1965). In that case Judge Sweeney found that *de facto* segregation was contributing to inequality of educational opportunity at the schools complained of. He then granted relief, not upon a theory that the School Board had an affirmative duty to remedy racial imbalance, but rather because the Constitution requires a School Board to provide equal educational opportunities for all children within the system.

IV.

Discussion of Remedies

A. *The Northeast Denver Schools*

Our preliminary injunction decree dealt largely with the Park Hill schools and, in effect, specifically enforced Resolutions 1520, 1524 and 1531, with the exception of that part of the resolution having to do with East Denver High School and that part having to do with Cole Junior High School.

In part I of this opinion we have determined that the plaintiffs are entitled to full relief in accordance with the Resolutions and are also entitled to have the East and Cole resolutions implemented in the final judgment. Inasmuch as we have concluded that the preliminary injunction should be made final, an appropriate form of judgment can be prepared to cover this. The preliminary order will remain in effect for the remainder of this year, and the present judgment will take effect in September 1970.

B. *A Program of Improvement*

Although we have concluded that there is not *de jure* segregation in the so-called core city schools,[91a] we have found and concluded that there is a denial of equal opportunity for education in these schools. We have found and concluded that the achievement level in these schools is markedly lower and dropout rates are high; and that there has been a concentration of minority and inexperienced teachers.

How to remedy this condition, that is how to extend to the plaintiffs equal educational opportunity, poses a seri-

[91a] That is, the segregated schools referred to in part III above.

ous and difficult problem, and we do not here present any cure-all. One obvious answer, of course, is that these schools must be renovated as educational institutions. The stress here is not on the inferiority of the buildings, and, indeed, they are oftentimes older and less attractive. Rather, the emphasis is on improving these as educational institutions. One obvious equalizing factor would be to have faculty members who are as competent as the faculty members at Anglo schools.

At the present time, teachers with seniority can select the superior schools and they do so. When these transfers occur a degrading effect on the school which they leave necessarily results. All concerned are reminded that theirs is a less desirable school. It may be that the administration will have to adopt a rule which prohibits these optional transfers by faculty members. These schools are entitled to at least their fair share of the most competent teachers. The administration may have to assign their very best teachers even if premium salaries have to be paid in order to accomplish this.

It is also clear from the evidence that the remedial or special education programs which have been carried on in these schools have not resulted in any significant improvement and so other methods are indicated. It does not fill the bill to merely apply for a federal grant and reduce the teacher-pupil ratio.

Above all, these schools need pride and spirit so that the participants, teachers and pupils, will feel that they are part of a meaningful effort. Certainly a first step in instilling this is to provide them with leadership—dedicated personnel plus the tools to carry out programs. Whether this objective is possible cannot be determined until a genuine good faith effort is forthcoming. In Superintendent

Gilberts and his staff the Board has access to experts who are capable of formulating such a program. Obviously this Court does not have this expertise, but it anticipates hearing from experts, including the Board staff.

C. *Compulsory Transportation*

The evidence in this case shows that neither the plaintiffs nor the defendants nor other interested parties are in favor of bussing as such. It is, however, conceded to be a necessity where integration is ordered, and it would appear to be the only way to implement the Resolutions (1520, 1524 and 1531) and to carry out Part I of this opinion.

In connection with equalizing the educational opportunity, it is not so clear that compulsory transportation is the answer. To be sure, if the children could go to school together on a natural basis, it would undoubtedly provide the most effective antidote for the inferiority. However, setting up an artificial and extensive system of bussing which compels cross-movement and which is not supported by either side has some tendency to undermine the program from the start.

There is a dearth of law in connection with the remedy applicable to equalizing the educational opportunity, and compulsory integration is not yet at least the prescribed remedy. However, it is conceivable that this could become the only effective remedy as a matter of law, and it conceivably could become recognized as a matter of constitutional law. Nevertheless, at this writing, the fashioning of a remedy is a process of weighing and balancing the equities.

From the intervenors and from other sources at the trial, the difficulties and vicissitudes of mandatory bussing have been presented. One persuasive point arises from the

proof of the plaintiffs. Their evidence establishing the inferiority of the subject schools is so convincing that it raises a serious equitable question about subjecting any pupils, minority or majority, to them. It would be imposing a *sanction* on pupils from good schools—a sanction for an offense which they did not commit.

D. *Voluntary Transfer Policy*

We have a single suggestion apart from improvement and that is a system of genuine voluntary transfer out of inferior schools to good schools. This would be a matter of right without the need for securing a reciprocal transfer from an Anglo school to a minority school. Persons desiring this immediate improvement of their educational opportunity could get it, and the District would, in accordance with its present policy based on distance, be required to furnish transportation. Moreover, the Board would be *required* to furnish space for these students. On the other hand, pupils attending the better schools would not be *compelled* to transfer to the core city schools.[21] They could do so if they wished.

Our suggestion recognizes that there are members of the minority groups who are not enthusiastic about compulsory bussing. These parents have the same apprehensions as the majority parents about sending their children into unknown conditions, and perhaps into hostile atmospheres. At the same time, in many instances, they have the same hopes and aspirations for their children as do members of the majority and are willing to make the sacrifice in order to improve the educational opportunity for them.

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[21] This would not, of course, apply to students subject to part I of this opinion and the integration Resolutions because actual inte-

Arguably, at least, this method satisfies the Constitution in that it recognizes the right of every student and makes that right available to him without forcing it on him. Comments of the litigants on this will be considered at a further hearing.

E. *Voluntary Open Enrollment*

As to the voluntary open enrollment policy of the School Board, certainly they should be free to pursue and develop this to the nth degree. Their position at the trial was that this would ultimately produce integration. One questions whether it would, but if it can be operated successfully, the Board should be encouraged to carry it out. It should be noted, however, that this is neither "voluntary" nor is it "open" because it requires that there be spaces available in the transferee school or that there be an exchange program. It seems clear to us that there would be few participants in an exchange program with the core city schools. It seems highly unlikely that students would elect to go to these schools from white neighborhoods and so it is questionable whether any integration would be achieved in a substantial way from this program. On the other hand, the method selected above has no such "catch" in it.

It is contemplated that any decree which is finally promulgated here will not be effective until next fall. On the other hand, the preliminary injunction heretofore entered would continue for the remainder of this school year until next September when the final judgment would be effective. This opinion does not purport to be a judgment for the purpose of appeal. Final judgment will be entered after a meeting with counsel which hopefully can be carried out within the next 30 days.

Appendix I: Achievement Data

Elementary Schools

Third Grade

School	*Average Median Achievement*
Barrett	2.81
Boulevard	2.80
Bryant-Webster	3.16
Columbine	2.93
Crofton	3.10
Ebert	2.71
Elmwood	3.42
Fairmont	2.85
Fairview	2.96
Garden Place	2.61
Gilpin	2.68
Greenlee	2.93
Hallett	3.06
Harrington	2.55
Mitchell	2.71
Smith	3.06
Stedman	3.13
Whittier	2.76
Wyatt	3.43
Wyman	3.05

Fifth Grade

School	*Average Median Achievement*
Barrett	4.73
Boulevard	4.33
Bryant-Webster	4.43
Columbine	4.27
Crofton	4.22
Ebert	4.17
Elmwood	4.62
Fairmont	4.10
Fairview	4.25
Garden Place	4.16
Gilpin	4.46
Greenlee	4.16
Hallett	4.24
Harrington	4.02
Mitchell	3.90
Smith	4.74
Stedman	4.64
Whittier	4.26
Wyatt	4.06
Wyman	4.47

Junior High Schools

School	*Average Median Percentile Score*
Baker	31.1
Byers	63.0
Cole	25.4
Gove	63.2
Grant	55.7
Hill	77.4
Horace Mann	32.3
John F. Kennedy	71.4
Kepner	49.0
Kunsmiller	62.2
Lake	48.7
Merrill	74.1
Morey	30.3
Rishel	57.2
Skinner	55.2
Smiley	42.9
Thomas Jefferson	75.6

Senior High Schools

School	*Average Median Percentile Score*
East	54
George Washington	76
John F. Kennedy	73
Abraham Lincoln	59
Manual	30
North	53
South	66
Thomas Jefferson	72
West	35

APPENDIX II: TEACHER EXPERIENCE

ELEMENTARY SCHOOLS

(Plaintiffs' 20 Selected Target Schools)

School	*None*	*Probation*	*10 or more years*
Barrett	21.1	31.6	21.1
Boulevard	16.7	50.0	27.8
Bryant-Webster	13.8	34.5	44.8
Columbine	27.3	50.0	11.4
Crofton	21.4	42.9	28.6
Ebert	21.1	42.1	26.3
Elmwood	39.1	39.1	17.4
Fairmont	25.0	78.6	10.7
Fairview	10.3	33.3	25.6
Garden Place	18.4	36.8	15.8
Gilpin	25.0	41.7	25.0
Greenlee	12.5	40.0	25.0
Hallett	25.0	46.4	28.6
Harrington	30.4	73.9	0.0
Mitchell	26.0	44.0	16.0
Smith	26.4	49.1	7.5
Stedman	23.7	39.5	13.2
Whittier	27.3	56.8	9.1
Wyatt	13.6	27.3	27.3
Wyman	22.2	50.0	16.7
Total Average	22.5	45.4	18.7

(Plaintiffs' 20 Selected Anglo Schools)

School	*None*	*Probation*	*10 or more years*
Ash Grove	17.9	35.7	21.4
Bradley	2.9	11.8	58.8
Bromwell	18.2	18.2	45.5
Carson	16.0	40.0	48.0
Cory	0.0	18.2	40.9
Doull	14.7	20.6	58.8
Ellis	9.1	18.2	42.4
Ellsworth	25.0	62.5	25.0
Fallis	7.7	15.4	46.2
Gust	21.9	40.6	31.3
Knight	4.3	30.4	56.5
McMeen	3.0	24.2	51.5
Montclair	0.0	11.1	48.1
Palmer	6.3	12.5	75.0
Pitts	11.8	29.4	58.8
Sabin	8.0	20.0	38.0
Slavens	13.0	30.4	52.2
Traylor	10.3	20.7	58.6
University Park	14.3	37.1	48.6
Washington Park	0.0	36.8	36.8
Total Average	9.8	25.6	47.1

APPENDIX II: TEACHER EXPERIENCE (continued)

ALL JUNIOR HIGH SCHOOLS

School	*None*	*Probation*	*10 or more years*
Baker	32.1	60.7	10.7
Byers	14.0	43.9	26.3
Cole	39.6	65.9	14.3
Gove	31.0	45.2	19.0
Grant	19.5	34.1	24.4
Hill	14.5	33.7	36.1
Kepner	14.5	50.7	17.4
Kunsmiller	6.0	32.5	32.5
Lake	10.6	40.9	31.8
Mann	20.3	55.9	16.9
Merrill	16.2	35.1	33.8
Morey	27.8	53.7	13.0
Rishel	16.7	36.7	21.7
Skinner	15.0	38.3	23.3
Smiley	35.7	63.3	7.1
Total Average	21.1	46.7	22.0

Target Schools

School	*None*	*Probation*	*10 or more years*
Baker	32.1	60.7	10.7
Cole	39.6	65.9	14.3
Morey	27.8	53.7	13.0
Smiley	35.7	63.3	7.1
Total Average	34.8	61.9	11.0

Anglo Schools

School	*None*	*Probation*	*10 or more years*
Hill	14.5	33.7	36.1
Merrill	16.2	35.1	33.8
Total Average	15.3	34.4	35.0

ALL SENIOR HIGH SCHOOLS

School	*None*	*Probation*	*10 or more years*
Lincoln	8.3	17.3	59.4
East	17.2	34.4	36.7
George Washington	8.9	17.0	54.1
Kennedy	6.6	15.4	48.5
Manual	17.1	37.8	32.4
North	8.2	29.1	41.8
South	8.2	16.4	55.7
Thomas Jefferson	6.8	22.2	50.6
West	14.5	30.0	40.0
Total Average	10.3	24.0	47.1

APPENDIX II: TEACHER EXPERIENCE (continued)

Target Schools

School	*None*	*Probation*	*10 or more years*
East	17.2	34.4	36.7
Manual	17.1	37.8	32.4
West	14.5	30.0	40.0
Total Average	16.3	34.1	36.4

Anglo Schools

School	*None*	*Probation*	*10 or more years*
George Washington	8.9	17.0	54.1
Kennedy	6.6	15.4	48.5
Thomas Jefferson	6.8	22.2	50.6
Total Average	7.4	18.5	51.0

APPENDIX III: PUPIL DROPOUT RATES

Junior High Schools	*Projected*	*Annual*
Baker	12.9	4.5
Byers	3.8	1.3
Cole	7.0	2.4
Gove	1.9	.6
Grant	3.0	1.0
Hill	.7	.3
Horace Mann	6.7	2.6
Kepner	3.7	1.5
Kunsmiller	1.7	.6
Lake	6.3	2.1
Merrill	.8	.3
Morey	15.7	5.1
Rishel	4.1	1.4
Skinner	2.1	.8
Smiley	6.1	2.1
John F. Kennedy	.3	.2
Thomas Jefferson	.6	.2
Senior High Schools	*Projected*	*Annual*
Abraham Lincoln	38.1	14.7
East	46.8	18.8
George Washington	10.8	3.6
Manual	57.0	24.4
North	51.8	21.9
South	39.6	15.3
West	46.9	19.5
John F. Kennedy	13.0	1.9
Thomas Jefferson	9.9	1.7

Opinion of District Court of May 21, 1970

UNITED STATES DISTRICT COURT

D. Colorado

Civ. A. No. C-1499

May 21, 1970

Wilfred Keyes, individually and on behalf of Christi Keyes, a minor, *et al.*,

Plaintiffs,

v.

School District Number One, Denver, Colorado, the Board of Education, School District Number One, Denver, Colorado, William C. Berge, individually and as President, Board of Education, School District Number One, Denver, Colorado, Stephen J. Knight, Jr., individually and as Vice President, Board of Education, School District Number One, Denver, Colorado, James C. Perrill, Frank K. Southworth, John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, individually and as members, Board of Education, School District Number One, Denver, Colorado, Robert D. Gilberts, individually and as Superintendent of Schools, School District Number One, Denver, Colorado,

Defendants.

Decision Re Plan or Remedy

William E. Doyle, District Judge.

It is to be recalled that this suit, which has been previously before the Court, was instituted as a class action by

Negro and Hispano public school students and their parents. Plaintiffs complained that there was de jure segregation in many of the schools in School District Number One, Denver, Colorado, and that an unequal educational opportunity was being provided in the segregated schools within the District. On March 21, 1970, after approximately three weeks of trial, this Court handed down a memorandum opinion and order finding that certain schools, elementary, junior high and a high school within an area of Denver known as Park Hill, and also some 15 schools within the core city, were segregated. It was also concluded that our temporary injunction entered in August 1969, finding a condition of de jure segregation in certain schools resulting from the Denver Board of Education's action rescinding Resolutions 1520, 1524 and 1531, which had been designed to have an integrating effect on Park Hill schools, must be made permanent. We ordered full implementation of these Resolutions. D.C., 313 F. Supp. 61.

A further determination was that certain schools within the core city were segregated as the result of housing patterns and the neighborhood school system; that this constituted de facto segregation and was not unconstitutional per se. A corollary finding and conclusion was that the segregated core city schools in question were providing an unequal education opportunity to minority groups as evidenced by low achievement and morale. The causes of this inferiority were held to be the segregated condition, together with concentration of minority teachers, low teacher experience and high teacher turnover in each of the schools. We stated that:

> The present state of the law is that separate educational facilities (of the *de facto* variety) may be maintained, but a fundamental and absolute requisite is that

these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools. 313 F.Supp. at 83.

We thus concluded that the School District had violated the equal protection clause of the Fourteenth Amendment by maintaining and operating schools which deprived the recipients of an equal educational opportunity. Both plaintiffs and defendants were asked to submit plans to remedy the inequality found to exist.

The cause is then presently before us for the purpose of fashioning a remedy which hopefully will establish equality of educational opportunity in the Court designated segregated schools.

Both plaintiffs and defendants have submitted lengthy plans for improving educational opportunity and many of the foremost authorities on this subject, both with respect to the Denver area and nationwide, have been called upon to testify.

I.

Description of Plans

Plaintiffs' proposed plan involves a three-step process for raising achievement and equalizing educational opportunity. The first step is desegregation, or the elimination of racial isolation of minority students through cross-transportation of pupils. Plaintiffs have concentrated on this phase of the program and the plans for desegregation are, for the most part, the product of computer analysis. The second phase involves integration, which the plaintiffs define

as the educational process of promoting mutual respect and understanding among students, teachers and the community. The final portion of the plaintiffs' plan suggests a system of compensatory education programs, carried out in an integrated environment, designed to equalize achievement.

At the outset we note that plaintiffs urge that the Court should reconsider certain schools which plaintiffs consider "target" schools, but which the Court found not to be *segregated* inferior schools. Plaintiffs call attention to the fact that two schools, namely Elyria and Smedley, are not only inferior in terms of achievement, but also meet the guideline set by the Court that the school contain at least 70 to 75 percent Negro *or* Hispano students. Furthermore, plaintiffs ask us to reconsider at least nine other schools which have a *combined* minority population of over 70 percent.[1] Failure to include Elyria and Smedley Schools was due to oversight. These must now be included in a plan for relief. We have concluded that none of the plans are wholly suitable and that a carefully tailored plan consisting of parts of the submitted ideas should be adopted. Nevertheless, a brief description of the plaintiffs' and defendants' proposals will furnish some understanding of the problem and of this order.

Plaintiffs propose *four* alternative plans for desegregation of elementary schools. The first of these desegregates the Court designated elementary schools by a system of cross-bussing. The total number of schools involved would be 29; the total number of students to be transported would be 8,380; the average miles traveled per student one-

[1] We concluded in our March 21 opinion that it was not appropriate to place Negroes and Hispanos in one category to arrive at a minority population of over 70 percent. 313 F.Supp. at 69.

way would be 6.4; the minimum Anglo enrollment at any school designated by the Court would total 54 percent.

The second proposed alternative plan calls for enrolling only pupils in grades 4-6 in the 12 Court designated elementary schools. Each of these schools would be paired with one or more Anglo schools which would be used only for grades K-3. This plan would involve 31 schools; 11,109 students would be transported; the average number of miles traveled per student one-way would be 6.3; minimum Anglo enrollment at the Court designated schools would be 51 percent.

Plan three is similar to plan one except that it would include all of plaintiffs' target elementary schools rather than just the Court designated elementary schools. It would, of course, require a much greater transportation effort involving as it does numerous schools which the Court has not included.

Plan four is similar to plan two, except that all of plaintiffs' target schools are provided with relief.

Alternative plans are submitted by plaintiffs for desegregating junior high schools. The *first* of these would desegregate Cole Junior High School by reassigning to Cole some 1,038 students already being bussed to Thomas Jefferson and John F. Kennedy. Also, students now being bussed to Cole would be bussed instead to Thomas Jefferson and John F. Kennedy. This plan would increase Anglo enrollment at Cole to 66 percent. The second alternative plan would desegregate not only Cole, but also Horace Mann, Lake, Morey and Baker Junior High Schools by a system of cross-bussing similar to that involved in the first alternative plan.

Plaintiffs also propose alternative programs for equalizing educational opportunity at Manual High School. *First*,

they recommend alteration of the school attendance boundaries of Manual, East and South, to create long narrow north-south corridors for each of the above schools. This would result in many Anglo students from south Denver attending Manual. As a *second* alternative, the plaintiffs suggest that Manual be made an open school which could be attended by any student in the District and which would specialize in vocational and pre-professional training. This plan is essentially the same as that proposed by the Board with respect to Manual.

Finally, plaintiffs have suggested several programs which would aid in creating cultural understanding and respect as well as programs for equalizing educational opportunity through compensatory education. These include faculty and staff inservice training and orientation, programs for community involvement, use of paraprofessionals, tutorial systems, individualized instruction, increased pre-school training and others which are very similar to the School Board's suggestions, except that under plaintiffs' plan, desegregation constitutes an essential first step.

The defendants' program for equalizing educational opportunity in the Court designated schools is basically one of compensatory education, with little emphasis on desegregation. Defendants offer some opportunity for mixing of the races, in that pupils at the fifteen Court designated schools could transfer to a school of their choice on a space guaranteed basis with transportation provided by the District, if the transfer will improve racial balance. This is similar to our suggestion in the March 21, 1970 opinion and it differs from the earlier School Board VOE program since the availability of space at a receiving school is not a precondition to transfer.

The remaining of defendants' offerings deal with various forms of compensatory education. Its first section outlines proposals for staffing. There would be encouragement and incentives to induce good teachers to work at the core city schools by extension of the school year and increased teacher compensation. An effort would be made to integrate teaching and administrative staffs. Teacher aides and paraprofessionals would be employed so that teacher time could be utilized more efficiently, there would be human relations training for all school district employees, and teachers would receive instruction in preparation for assignment to target schools.

Educational complexes, as described in the plan, are currently in preparation. A complex would include a basic neighborhood school with special programs at other schools in the cluster. Subjects, activities and services offered at the complex would be oriented to the requirements of the community in which the complex is located.

Defendants' plan also recognizes the importance of the early development of a child, and the need to reach minority children at an early stage. Programs such as Head Start now being used would continue. Those programs currently in use deal with children from three years old to the first grade in certain areas of the city, and a proposed National Follow Through program will work with children through the third grade.

Defendants' plan also describes special programs currently in progress or proposed for Cole Junior High School and Manual High School. The efforts at Cole include the use of laboratory approaches in all academic areas; use of inservice training; use of tutors and student aides; increased counseling efforts; a work-study program; and an extension center and a "crisis room" to be used with stu-

dents who do not adjust well to a regular classroom setting and are potential dropouts or subjects for suspension from school. The programs at Manual include extensive vocational skills and pre-professional courses and advanced placement opportunities.

At present, funds are available under Colorado Senate Bill 174 for children whose reading skills are two or more years below their grade level. Current S.B. 174 financed programs are in effect at Fairview Elementary School, and Baker and Cole Junior High Schools. State appropriations are expected to permit the continuation of these programs.

Finally, defendants list a number of innovative practices. These would emphasize the active, rather than passive elements of learning, recognizing that pupils will vary in their rate of learning based on their ability, background and other factors; efforts would be made to avoid practices which might degrade the child, such as underestimating his ability or denigrating his background or family (no matter how subtly or unconsciously done); and an effort would be made to supply an attractive climate for learning —attractive buildings and classrooms, good interpersonal relationships between parents, pupils and teachers, excursions into places of greater interest and so forth are all contemplated in this type of program.

II.

The Testimony

The crucial *factual* issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equalizing effects or whether desegregation and integration are essential to im-

proving the schools in question and providing equality. The evidence of both parties has been directed to this question.

Plaintiffs' evidence focused directly on the proposition that desegregation is essential in improving the quality of educational opportunity in the Court designated schools and that compensatory programs of the type proposed by the defendants cannot work in a segregated setting.

Dr. James Coleman, professor of social relations at Johns Hopkins University and author of the Coleman Report on equality of educational opportunity, testified that isolation of children from low socioeconomic families creates an atmosphere which inevitably results in an inferior educational opportunity. Dr. Coleman stated that a child's ability to learn is significantly affected by the educational stimulation provided by his family. Since Negro and Hispano children from low socioeconomic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socioeconomic status, the negative effect produced by family background is reinforced rather than alleviated. Dr. Coleman testified that although a racially isolated school is not inferior *per se*, it will inevitably provide an unequal educational opportunity where the racial or ethnic isolation involves a homogeneous student body all from uneducated and deprived backgrounds.

Dr. Neil Sullivan, who is now Commissioner of the Massachusetts State Board of Education and who installed the Berkeley desegregation plan in Berkeley, California, testified that in his opinion it was racial segregation itself, rather than isolation of children from low socioeconomic families, which caused the inferiority of educational op-

portunity. Dr. Sullivan stated that Berkeley had attempted to improve racially segregated schools by massive programs of compensatory education including lowering the teacher-pupil ratio, improving equipment and materials, and instituting cultural enrichment programs. These programs had little effect on student achievement. It was Dr. Sullivan's expert opinion that any effort at compensatory education must be correlated with desegregation if it is to achieve positive results. He also stated that a program of desegregation similar to that used in Berkeley required two years of preparation and planning.

Dr. Sullivan's testimony was reinforced by the testimony of Dr. Robert O'Reilly. Dr. O'Reilly, the assistant director of research and evaluation for the New York State Department of Education, has made the most extensive study of compensatory education programs on a national scale currently available. He explained that most compensatory programs include such items as lowering teacher-pupil ratio, use of paraprofessionals, inservice teacher and staff training programs, individualized tutoring and cultural enrichment courses. He concluded from this study that compensatory education carried on in a segregated atmosphere had little or no effect on raising achievement. Dr. Sullivan conceded desegregation in and of itself is not a cure-all, but is an essential step in improving educational opportunity and that compensatory programs are important and probably useful, but only if conducted in a desegregated setting.

The main witness for the defendants was Dr. Robert Gilberts, Superintendent of Schools for School District Number One. Dr. Gilberts explained the defendants' proposed plan and offered a critique of the plaintiffs' suggested program. He stated that low achievement among children in

the Court designated schools was the result of a number of factors, including home situation, lack of discipline, absence of stimulation by parents, and verbal deficiencies resulting from the families' limited vocabulary. Although Dr. Gilberts was the developer of Resolutions 1520, 1524 and 1531, designed to desegregate schools in Park Hill, he indicated that this was merely a pilot project. He maintained that there is no affirmative evidence that desegregation would aid in providing an equal educational opportunity for minority children. Furthermore, Dr. Gilberts expressed doubt that desegregation could be successful without broad community support.[3]

The defendants' plan, as explained by Dr. Gilberts, is designed to reconstruct the educational climate by such programs as differential staffing, improved inservice training for teachers and staff, special innovative programs of vocational and preprofessional training at Manual High School and to some extent at Cole Junior High School, and increasing the number of experienced teachers at the Court designated schools. A program similar to the present Voluntary Open Enrollment would be instituted, but with a guaranteed open space provision so that any student in the district might transfer to another school with transportation provided by the District if the transfer would improve the racial balance of both receiving and sending schools. Within the next two years a portion of the "complex system" will be initiated in Denver. Dr. Gilberts admitted, however, that only the new VOE program was specifically designed to provide some measure of desegregation. For the most part the defendants' programs are to be carried out in a substantially segregated setting.

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[3] We agree that community support is essential, but this, of course, requires a community education program—indeed a campaign.

Defendants also called Messrs. Ward, Morrison and Rehmer, the Principals of Manual High School, Cole Junior High School and Bryant-Webster Elementary School, respectively.

Mr. Ward testified that he had initiated several innovative programs at Manual since becoming Principal. These included work-study vocational training in areas such as building trades, metal work, power and transportation and home economics. He also testified that pre-professional studies were instituted. These are designed to familiarize pupils with occupational fields such as law, medicine, education and engineering. Although there was no evidence that these innovative programs improved the academic achievement of Manual students, Mr. Ward stated that they had intensified interest among students in remaining in school.

Mr. Morrison has also begun certain innovative programs at Cole Junior High School. These include the use of laboratory approaches in all academic areas, tutors and student aides, work-study programs and the "crisis room" and extension center. He testified that these approaches have succeeded in restoring student and community confidence in the school. The result of these programs on academic achievement has not yet been determined. It does appear though that Cole Junior High is now being used as a specialty school.

Mr. Rehmer has instituted new programs at Bryant-Webster which are basically compensatory in nature, and have achieved some success in reviving student interest. This is a predominantly Spanish elementary school in which compensatory reading and some Spanish oriented programs have been stressed.

Finally, these Principals agreed that their programs could be carried out in an integrated setting and that

desegregation of their schools would substantially improve the educational opportunity for their students.

III.

Issues of Law

Before discussing our determinations of fact we must mention that there are present herein two novel questions of law.

The *first* of these is discussed in the memorandum opinion and order of March 21, 1970. This is the question whether a condition of de facto segregation is to be remedied in the same manner as a condition of de jure segregation. We found at the trial that the schools in question became segregated as a result of neighborhood housing patterns—at least that this was the substantial factor in producing the result. It was not caused by positive law or as a result of official action. In the present state of the law, particularly in this the Tenth Circuit, we were of the opinion that desegregation could not be decreed in these circumstances. Undoubtedly this question will receive attention in higher courts at the behest of one or both of the parties and we do not pursue it.

The *second* question is one of both law and fact, but is predominantly to be determined from the evidence. It is whether in a setting of grossly inferior minority schools, compensatory education—improvement of the minority schools, together with a free transfer policy such as that suggested in the March 21, 1970 opinion—constitutes a constitutionally acceptable remedy or whether in order to in truth improve the schools and to thus satisfy the requirements of the Constitution, it is necessary to prescribe and implement also a program of desegregation and inte-

gration. We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment. We have, however, delayed its being carried into effect for one year (for part of the program) and for two years (for the remainder). We have directed the adoption of an interim program such as that suggested in the March 21, 1970 opinion.

IV.

Findings and Guidelines

1. The overwhelming evidence in this case supports the finding and determination which we now make that improvement in the quality of education in the minority school can only be brought about by a program of desegregation and integration. This is the positive conclusion of Doctors Coleman, Sullivan and O'Reilly, all of whom are authorities in the field. Their opinions are supported by extensive, comprehensive, in depth studies and, in some instances, actual experience in the field.

2. The evidence clearly establishes that the segregated setting stifles and frustrates the learning process. One of the expert witnesses made the matter clear when he said that the isolation of any group develops a homogeneous mass which brings out the worst in the individual members and establishes a low standard of achievement. When, in addition, the group is from a socioeconomic group which is deficient, the bad results are intensified. Add to this the minority factor with the attendant lack of pride and

hope, and the task of raising achievement levels becomes insurmountable. The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students.

3. To seek to carry out a compensatory education program within minority schools without simultaneously developing a program of desegregation and integration has been unsuccessful. Experience has shown that money spent in these programs has failed to produce results and has been, therefore, wasted. The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education. Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful.

4. A system of free transfer to designated Anglo or white schools of minority groups furnishes a minimal, but at the same time an insufficient, fulfillment of the consti-

tutional rights of the persons involved. True, such a method furnishes some relief to the individuals who choose to exercise it, but here again it promises little unless it is accompanied by a careful, painstaking program of compensatory education because here, without the support, the individual is alone in an environment which is much more difficult and competitive than either the segregated or integrated one. It should be used then as an interim measure. It will serve to minimize the deprivation during the period of planning and preparation for a permanent system.

5. As a prelude to a program of integration, the Court designated minority schools must be drastically improved. The inequity implicit in sending majority students to a grossly inferior school was noted in our March 21, 1970 opinion. Substantial correction of these conditions is, therefore, a necessity.

V.

Provisions of the Plan

In our opinion of March 21, 1970, we recognized the underlying constitutional basis for this decision, which is that a state or its subdivision may not constitutionally maintain any program which treats members of minority groups unequally as compared with other groups. It makes no difference that the system may appear to be equal on its face, if its operation in fact results in unequal treatment. Further, when a court finds that such inequality of treatment exists, it is constitutionally bound to provide a remedy which will wipe out the inequality "root and branch."

Having found, in accordance with the overwhelming weight of the evidence, that the racial isolation of Negro and Hispano children which exists in the fifteen schools designated in this Court's opinion of March 21, 1970, to-

gether with Elyria and Smedley Elementary Schools, is the primary factor producing inequality of educational opportunity at those schools and that this inequality can be remedied only through a combined program of desegregation, together with a massive program of compensatory education, and having further concluded that neither the plans submitted by plaintiffs nor those of defendants are wholly satisfactory, we, therefore, now delineate the guidelines of the plan which, based on the evidence and the law, satisfies the Constitution and, at the same time, holds some promise of acceptance and success.

A. *Summary*

The plan calls for desegregation of the Court designated elementary schools (grades 1 through 6) including Smedley and Elyria Schools. Part of this is to be accomplished on or before September 1, 1971, and the remainder is to be carried out not later than September 1, 1972. The detailed plan, including the exchanges which will be necessary, is not adopted now because it is believed that further study must be made. Baker Junior High School is also to be desegregated. A substantial part of the desegregation program must be completed on or before September 1, 1971, and complete desegregation and integration is to be accomplished on or before September 1, 1972.

Cole Junior High is also to be desegregated and integrated on or before the same dates applicable to Baker. This can be accomplished by making Cole a specialty school if the Board of Education determines that this is more feasible.

Manual High School is to become a specialized City high school which will offer pre-professional and particular college preparation courses. It will also offer, in accordance

with the Board's plan, a variety of work-study programs designed to develop talent in arts and trades.

The compensatory education program and the free transfer programs of the Board are also part of the plan.

B. *Elementary Schools*

At least 50 percent of the Court designated elementary schools, grades 1 through 6, including Elyria and Smedley Elementary Schools, must be desegregated by fall of 1971.

Complete desegregation of all Court designated elementary schools, grades 1 through 6 must be accomplished by the beginning of school in the fall of 1972. We consider complete desegregation fulfilling the constitutional requirement to be accomplished when each of the above schools has an Anglo composition in excess of 50 percent. Although it is probably not constitutionally required, the desirability of having the minority student population in each of these schools apportioned equally between Negro and Hispano children is apparent.

Because the plaintiffs and the School District have the expertise necessary for devising a system of school redistricting and transportation to achieve the result set forth above, we leave these details to them. But we stress that the details of the scheme must be carefully examined and checked, having in mind that the program is a human one. While the computers can be useful in such an effort, their results must be checked with care to prevent unnecessary burden to the persons involved. The final details will be subject to review by the Court. We have, of course, been reluctant to decree mandatory transportation, and it should be avoided to the extent possible.

C. *Junior High Schools*

Substantial progress must be made in desegregating Baker Junior High School by fall of 1971. Complete desegregation of Baker Junior High School along the lines set forth above for elementary schools must be effectuated by the beginning of the school year in the fall of 1972.

Cole Junior High School. The Board is directed to adopt one of two alternative plans. First, the Board of Education may desegregate Cole. If this alternative is adopted, substantial progress must be made in desegregating Cole by fall of 1971, with complete desegregation of Cole Junior High by the beginning of the school year in the fall of 1972. The second alternative is to establish Cole by fall of 1971 as an open school for special education and other special programs now in effect or which the School Board may wish to put into effect in the future. Under this second alternative, those students who would have attended Cole in the 1971-72 school year, but who do not wish to participate in the special programs offered at Cole, may transfer with a guarantee of space to another junior high school. It should be open to students from other parts of the City in furtherance of the special programs. A basic assumption is that the desegregation and integration policies here enunciated will be accomplished regardless of which scheme is adopted for Cole.

D. *Manual High School*

We approve and order implementation of the plans set forth by the defendants and plaintiffs for establishing Manual as an open school for the continuation and *expansion* of the vocational and pre-professional training programs which have been instituted by the Principal, the faculty and staff.

If this program develops and transforms Manual to an outstanding institution capable of attracting and accommodating students from the entire City, an integration program would be superfluous.

E. *Preparation*

Between now and the beginning of school in fall 1971, and continuing through fall of 1972, an intensive program of education must be carried out within the community and the school system in preparation for desegregation and integration. This should include at least a program for orienting teachers in the field of minority cultures and problems and how to effectively deal with minority children in an integrated environment. A similar program should be undertaken for staff and administrators. It will also be necessary to educate the community as to the educational benefits and values, not only for the children but also for the community, to be derived from desegregation and integration.

F. *Free Transfer*

Between now and the fall of 1971, *as an interim measure only*, we approve the Board of Education's program for VOE with a guaranteed space provision, and it shall be so implemented with respect to all Court designated schools including Elyria and Smedley Elementary Schools.

G. *Compensatory Education*

We approve of the Board's plans for compensatory education programs for minority children. At a minimum these programs should include:

1. Integration of teachers and administrative staff;

2. Encouragement and incentive to place skilled and experienced teachers and administrators in the core city schools;

3. Use of teacher aides and paraprofessionals;

4. Human relations training for all School District employees;

5. Inservice training on both district-wide and individual school bases;

6. Extended school years;

7. Programs under Senate Bill 174;

8. Early childhood programs such as Head Start and Follow Through;

9. Classes in Negro and Hispano culture and history; and

10. Spanish language training.

All of the above programs, including several others, are now included in the defendants' plan. These programs for compensatory education are to be initiated for the 1970-71 school year. Those programs which are already in effect should be continued in the 1970-71 school year, with any modifications which the Board of Education deems necessary in order to carry out this order.

VI.

Concluding Remarks

We are mindful that the task of the School District is a difficult and complex one. Constitutional standards must, of course, be met at the earliest feasible time, but a program which is too hastily conceived and developed could fail to

achieve its goals. In view of the essential preparation and planning which must go into a program of this magnitude, it is felt that a two year period within which to accomplish desegregation and integration is reasonable, particularly in light of the fact that the plan calls for substantial progress to be made during the year 1971-72.

We have noted the desirability (even though it is not constitutionally mandated) of having both Negroes and Hispanos in the desegregated schools on as close to an equal basis as possible. If integration and desegregation are to have the maximum salutary effect, it would seem to follow that school children be exposed to all racial and ethnic groups which make up the larger community in which they live. True integration is not likely to occur in Denver if Negroes and Hispanos are separated in the public educational system, no matter how innocently the separation has come about.

It is also to be noted that only grades 1 through 6 of the elementary schools are covered in the Court's plan. Kindergarten students are excluded. In the present de facto segregation circumstances in which the effort is improvement, we assume that we have some discretion. Although it may have some value to desegregate children at that early age, it must be kept in mind that their school day is shorter than that of the older children. Mandatory transportation, which may well be necessary to effectuate much of the Court's plan, seems impractical. It seems preferable to wait until that child is on a schedule more closely aligned with that of the other students at his school. Furthermore, because of the tender years of the kindergartners, it appears somewhat dubious whether the value to be gained is sufficient to justify placing these infants in this extraordinary setting.

Finally, we cannot predict with any degree of certainty how successful the free transfer or open enrollment program will be. However, the evidence at the hearing was not encouraging. On the other hand, it may surprise us. Indeed, there is no assurance that the program here prescribed will fully succeed. Its success will depend in large part on the effort which is expended and on the spirit in which the endeavor is carried out.

All adjudications in the case have now been completed and a final judgment can be entered. The remaining detail is a matter requiring the closest scrutiny and study which will require many months. There being no further substantive matter to decide, there is no just cause for delay and the entire matter can now be appealed.

Opinion of Court of Appeals of June 11, 1971

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY, 1971, TERM

No. 336-70

WILFRED KEYES, *et al.*,

Plaintiffs-Appellees,

v.

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*,

Defendants-Appellants.

No. 337-70—(Cross-appeal)

WILFRED KEYES, *et al.*,

Plaintiffs-Appellants,

v.

SCHOOL DISTRICT No. 1, Denver, Colorado, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. C-1499)

Gordon G. Greiner, Denver, Colorado (Conrad K. Harper, New York, New York, on the brief), for Keyes, et al.

William K. Ris, Denver, Colorado (Benjamin L. Craig and Michael H. Jackson, Denver, Colorado, on the brief), for School District No. 1, et al.

Before PICKETT, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

This is a suit in which the parents of children attending Denver Public Schools sued individually, on behalf of their minor children, and on behalf of classes of persons similarly situated, to remedy the alleged segregated condition of certain Denver schools and the effects of that condition. The School District, the present Board of Education and its Superintendent were all named as defendants. The action was brought under 42 U.S.C. §§ 1983, 1985, 28 U.S.C. § 1343(3), (4), and the Fourteenth Amendment of the United States Constitution seeking to enjoin defendants from maintaining, requiring, continuing, encouraging and facilitating separation of children and faculty on the basis of race, and further from unequally allocating resources, services, facilities and plant on the basis of race. Declaratory relief was also sought under 28 U.S.C. § 2201. On appeal, defendants appear as appellants and cross-appellees, and plaintiffs appear as appellees and cross-appellants.

The reported background is extensive. In July, 1969, appellees' motion for preliminary injunction was granted in an opinion found at 303 F.Supp. 279. The motion sought to enjoin the rescission of Resolutions 1520, 1524 and 1531. The preliminary injunction was appealed and was remanded by this court for further findings and consideration of additional questions. Thereafter, the preliminary injunction was supplemented and modified at 303 F.Supp.

289. The decision on the merits is recorded at 313 F.Supp. 61, and the remedies are set forth in an opinion at 313 F.Supp. 90.

The complaint set out two separate causes of action. The first cause contained six counts, all of which pertained to rescission of School Board Resolutions 1520, 1524 and 1531. Therein the plaintiffs alleged that these Resolutions were an attempt by the School Board to desegregate and integrate the public schools of Northeast Denver, and that the rescission of these resolutions was unconstitutional because the purpose and effect was to perpetuate racial segregation in the affected schools. In connection with this cause of action, plaintiffs urge that the rescission of the Board Resolutions constituted affirmative state action resulting in de jure segregation in the schools affected thereby. The second cause of action contained three counts that are pertinent here. The first count, in effect, alleged that through affirmative acts the defendants and their predecessors deliberately and purposely created and maintained racial and ethnic segregation in the so-called "core" area schools within the district. The second count, in effect, alleged that the defendants had purposely maintained inferior schools by their method of allocation to these schools, and such practice has caused those schools to be substantially inferior to other schools within the district with predominantly Anglo students. The effect of such practice, plaintiffs urged, denied the minority students an equal educational opportunity in violation of the equal protection clause of the Fourteenth Amendment. The third count was an attack upon the school district's neighborhood school policy. They urge such policy to be unconstitutional because it results in segregated education.

In substance, the trial court found and concluded as to the first claim that the named schools in Northeast Denver were segregated by affirmative state action. In its findings, the trial court noted specific instances of boundary gerrymandering, construction of a new school and classrooms, minority-to-majority transfers, and excessive use of mobile classroom units in this section of the district, all of which amount to unconstitutional state segregation. In addition, it was held that the adoption of Resolutions 1520, 1524 and 1531 was a bona fide attempt by the Board to recognize the constitutional rights of the students affected by prior segregation, and that the act of repudiating these Resolutions was unconstitutional state action resulting in de jure segregation. As to the second claim, on the first count, the court found that the acts complained of in the core area were not racially inspired, and accordingly the allegations of de jure segregation were not accepted. On the second count, the court found that although the core area schools were not segregated by state action, fifteen designated schools should be granted relief because it was demonstrated that they were offering their pupils an unequal educational opportunity in violation of the Fourteenth Amendment equal protection clause. Upon findings that the Denver neighborhood school policy had been constitutionally maintained under the standards set forth in Board of Education of Oklahoma City v. Dowell, 375 F.2d 158 (10th Cir. 1967), and Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), relief on the third count was denied.

On appeal in No. 336-70, appellants attack the findings and conclusions as to the first claim and the second count of the second claim. In the cross-appeal, No. 337-70, the Keyes class urge error in the findings and conclusions regarding the first and third counts of the second claim.

Appellants' initial argument in No. 336-70 makes a two-fold attack on the findings and conclusions regarding the existence of de jure segregation in the schools located in Denver's Northeast sector. First, it is contended that under a proper application of the law, the evidence will not support a finding of de jure segregation. Second, appellants argue that the act of rescinding Resolutions 1520, 1524 and 1531 was not an act of de jure segregation.

A complete understanding and resolution of the issues presented by appellants requires a survey of the events which preceded the Board's action in rescinding the three Resolutions. In the Denver Public School System, there are 92 elementary schools, 16 junior high schools, and 9 senior high schools.[1] There has never been a law in Colorado requiring separate educational facilities for different races. The policy to which the School Board has consistently adhered is the neighborhood school plan. The goal is a centrally located school which children living within the boundary lines must attend. Although the Board has no written policy governing the setting of attendance boundaries, several factors have apparently been employed. Among these are current school population in an attendance area, estimated growth of pupil population, the size of the school, distance to be traveled, and the existence of natural

[1] The overall racial and ethnic composition of Denver Public Schools as of 1968-69 was as follows:

Educational Level	Total Students	% Anglo	% Negro	% Hispano
Elementary	54,576	61.7	15.2	22.0
Junior High	18,576	64.0	15.5	17.0
Senior High	23,425	76.1	10.4	9.0
Totals	96,577	70.7	12.7	15.8

boundaries.[3] The Board also attempts to draw junior high school and senior high school boundary lines so that all students transferring from a given school will continue their education together.

On several occasions during the 1960's, the Board formed committees to study the equality of educational opportunities being provided within the system. In 1962, the Voorhees Committee was assigned the onerous task. That group recognized that in a school district where there are concentrations of minority racial and ethnic groups, the result of a neighborhood school system may be unequal educational opportunities. Therefore, they recommended that the School board consider racial, ethnic and socio-economic factors in establishing boundaries and locating new schools in order to create heterogeneous school communities. The recommendations were apparently ignored.

Thereafter, in May, 1964, the Board passed Policy 5100 which also recognized that the neighborhood school plan resulted in the concentration of some minority racial and ethnic groups in certain schools. Rather than abandon the neighborhood school concept, however, the Board decided to incorporate "changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." But nothing of substance was accomplished.

In 1966, the Berge Committee was formed to examine Board policies with regard to the location of schools in Northeast Denver and to suggest changes which would lead to integration of Denver students. This committee

[3] Report and Recommendations to the Board of Education School District Number One Denver, Colorado, by a Special Study on Equality of Educational Opportunity in the Denver Public Schools (March 1, 1964), pp. A-1 to A-6.

recommended that no new schools be built in Northeast Denver; that a cultural arts center be established for student use; that educational centers be created; and that superior educational programs be initiated for Smiley and Baker Junior High Schools. Again, the recommendations were not effected.

In 1968, the Board passed the Noel resolution which again formally recognized the problem of concentrated racial and ethnic minority school populations in Northeast Denver and the possibility of resulting unequal educational opportunities. The resolution directed the Superintendent of Schools to submit to the Board a comprehensive plan for integrating the Denver Schools. A plan was submitted, and after a four-month study, Resolutions 1520, 1524 and 1531 were passed. In essence, each of these resolutions sought to spread the Negro populations of these schools to numerous schools by boundary changes, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20% and white students from other areas would produce an Anglo population in each school of about 80%. Resolution 1520 made changes in attendance areas of secondary schools; Resolution 1524 dealt with both secondary schools and junior high schools; and Resolution 1531 changed attendance areas of the elementary schools.

However, before full implementation of the Resolutions could be accomplished, a Board election was held. Two candidates who promised to rescind the Resolutions were elected, and thereafter the Board did rescind Resolutions 1520, 1524 and 1531. In their place, Resolution 1533 was passed which basically provided for a voluntary exchange program between the Northeast elementary schools and other elementary schools of the district. Shortly thereafter, this suit was initiated.

The schools of concern to this argument are located in Northeast Denver in what is generally referred to as the Park Hill area. The schools are: East High School, Smiley and Cole Junior High Schools, Barrett, Stedman, Hallett, Park Hill and Philips Elementary Schools. Prior to 1950, the Negro population was centered in the Five Points area, near the northwest corner of City Park. Since 1940, the Negro population has steadily increased from 8,000 to 15,000 in 1950, to 30,000 in 1960, and to approximately 45,000 by 1966. The residential movement reflecting this growth has been eastward, down a "corridor" which has fairly well defined north-south boundaries. In the early 1950's, York Street (some 16 blocks west of Colorado Boulevard) was the east boundary of the residential expansion. Ten years later, the movement had reached and crossed Colorado Boulevard to a limited degree, and now the corridor of Negro residences extends from the Five Points area to the eastern city limits. The schools of concern are in and adjacent to this narrow strip of Negro residences.

Barrett Elementary is located one block west of Colorado Boulevard in the heart of the Negro community. When it opened in 1960, the attendance lines were drawn to coincide almost precisely with the then eastern boundary of the Negro residential movement—Colorado Boulevard. When the school was being planned in 1958 and the sites for construction were being considered, the area west of Colorado Boulevard was already predominantly Negro; by 1960, when the school opened, the racial composition of the neighborhood which it was to serve was reflected in the 89.6% Negro student enrollment. In 1970, the racial and ethnic composition of the school was approximately 93% Negro, 7% Hispano.

In addition, Barrett was built to accommodate only 450 students, a factor which manifestly precluded its use to

substantially relieve the overcrowded conditions at adjacent schools. In 1960, Stedman (then predominantly Anglo), which was eight blocks due east of Barrett, was well over its intended capacity. Rather than constructing a larger physical plant at Barrett to accommodate part of Stedman's overflow, Barrett's size was restricted to serve only those pupils west of Colorado Boulevard.

The trial court held that "the positive acts of the Board in establishing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation, which condition exists at present. . . . The action of the Board . . . was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. And under such conditions we find that the Board acted purposefully to create and maintain segregation at Barrett." 303 F. Supp. at 290-91.

In 1960, Stedman was 96% Anglo, 4% Negro and was 20% above capacity. By 1962, it was 35 to 50% Anglo and 50 to 65% Negro. In 1963, it was 87.4% Negro and 18.6% Anglo, and still overcrowded. By 1968, this school was 94.6% Negro and 3.9% Anglo. Stedman is eight blocks due east of Barrett, and in 1960 the residential trend all but insured that in a few years it would be predominantly Negro. In 1962, three boundary changes were proposed to the Board which would have transferred students from Stedman to Smith, Hallett and Park Hill, each of which was predominantly Anglo. These three proposals were refused by the Board. In 1964, the Board made two boundary changes which affected Stedman: (1) a predominantly Anglo section of Stedman's school zone was detached to Hallett, and (2) the Park Hill—Stedman optional zone (96% Anglo) was transferred to Park Hill.

To facilitate an expanding population at Stedman, which was overwhelmingly Negro, mobile units were erected.

The trial court held: "The actions of the Board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the 'white' character of other Park Hill schools." 303 F. Supp. at 292.

In 1960, Park Hill and Philips Elementary Schools were predominantly Anglo. In 1968, Park Hill was 71% Anglo, 23.2% Negro and 3.8% Hispano; Philips was 55.3% Anglo, 36.6% Negro and 5.2% Hispano. Notwithstanding the Negro movement into this area, these two schools have continued a majority of Anglos in the student body.

The court stated: "In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and re-establishing the original district boundaries, the Board must be regarded as having acted with a purpose of approving those consequences." 303 F. Supp. at 292-93.

In 1960, Hallett Elementary was 99% Anglo; in 1968 it was 90% Negro, 10% Anglo. The school is about 12 blocks due east of Stedman. When the Stedman boundary changes were considered in 1962, Hallett was under capacity and was 80 to 95% Anglo. The results of the boundary changes, had they occurred, would have brought Hallett up to capacity and would have had an integrative effect on the latter school. The 1964 Stedman boundary change that sent the predominantly Anglo section of Stedman to Hallett resulted in a 80% Anglo section of Hallett's attendance area being transferred to Philips. The effect of the Hallett to Philips transfer was a reduction in Anglo pupils at Hallett from 68.5 to 41.5%. By 1965, when four mobile

units were built and additional classrooms constructed, Hallett was 75% Negro.

The court said: "The effect of the mobile units and additional classrooms was to solidify segregation at Hallett, increasing its capacity to absorb the additional influx of Negro population into the area." 303 F. Supp. at 293.

The feeder schools for Smiley Junior High School are Hallett, Park Hill, Smith, Philips, Stedman, Ashley and Harrington. By the established residential trend, Smiley will soon be all Negro. In 1968 there were 23.6% Anglo, 71.6% Negro and 3.7% Hispano, and there were 23 minority teachers. Only one other school in the entire Denver system, Cole Junior High, had more than six minority teachers. The court held: "The effect of this repeal [of Resolutions 1520 and 1524] was to re-establish Smiley as a segregated school by affirmative Board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75% minority and that future Negro population movement would ultimately increase this percentage. . . . We, therefore, find that the action of the Board in rescinding Resolutions 1520 and 1524 was wilful as to its effect on Smiley." 303 F. Supp. at 294.

In 1969, East High School was 54% Anglo, 40% Negro and 7% Hispano. The court held that neither before nor after the passage of Resolution 1520 could East be considered segregated. But "[r]escission of these resolutions might, through the feeder system, result in a segregated situation at East in the future." 303 F. Supp. at 294. In the opinion at 313 F. Supp. 61, 68, the trial court extended its findings of de jure segregation to East High and Cole Junior High: "The effect of the rescission of Resolution 1520 at East High was to allow the trend toward segre-

gation . . . to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational opportunity there. . . . We must hold then that this frustraion of the Board plan which had for its purpose relief of the effects of segregation at Cole were unlawful."

Thus the issue is whether, under applicable constitutional principles, the Board has acted with regard to the Park Hill area schools in a manner which violates appellees' Fourteenth Amendment rights. This controversy was tried to the district court without a jury. On the basis of the testimony and exhibits produced at that trial, the court made findings of fact and conclusions of law. To the extent that appellants' or cross-appellants' arguments rest upon a relitigation or reassessment of factual matters, Rule 52 F.R.Civ.P. 28 U.S.C. requires us to defer to the findings of the trial court unless we are satisfied that they are clearly erroneous. Mitchell v. Texas Gulf Sulphur, —— F2d —— (10th Cir. 1971); Fireman's Fund Insurance Company v. S.E.K. Construction Company, Inc., —— F.2d —— (10th Cir. 1970).

We begin with the fundamental principle that state imposed racial segregation in public schools is inherently unequal and violative of the equal protection clause. Swann v. Charlotte-Mecklenburg Board of Education, —— U.S. —— (1971); Brown v. Board of Education, 347 U.S. 483 (1954); Downs v. Board of Education of Kansas City, 336 F.2d 988 (1964). This Fourteenth Amendment prohibition against racial discrimination in public schools is not limited to the action of state legislatures, but applies with equal force to any agency of the state taking such

action. Cooper v. Aaron, 358 U.S. 1 (1958). And we can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers. Taylor v. Board of Education of City School District of New Rochelle, 294 F.2d 36 (2nd Cir. 1961).

Appellants maintain that although a racial imbalance does exist in the Park Hill area schools, it is justifiable under their neighborhood school policy which has been and is now operated with total neutrality regarding race. It is true that the rule of the Circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. United States v. Board of Education of Tulsa County, 429 F.2d 1253 (10th Cir. 1970); Board of Education of Oklahoma City v. Dowell, 375 F.2d 158 (10th Cir. 1967); Downs v. Board of Education of Kansas City, supra. However, when a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.

The evidence supports the trial court's findings regarding Barrett Elementary School. When construction of new schools in predominantly Negro neighborhoods is based on rational, neutral criteria, segregative intent will not be inferred. Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966); Sealy v. Department of Public Instruction of Pennsylvania, 252 F.2d 898 (3rd Cir. 1958); Craggett v. Board of Education of Cleveland, 234 F.Supp.

381 (N.D. Ohio 1964); Henry v. Godsell, 165 F.Supp. 87 (E.D.Mich. 1958). Conversely, if the criteria asserted as justification for the construction and designation of attendance lines are a sham or subterfuge to foster segregation, odious intent may be inferred. Here there is sufficient evidence to support segregative intent.

The school was admittedly built in an area of increasing school population with the stated purpose of relieving overcrowded conditions at nearby schools. But the size of the school belies its intended purpose. Although Negro students transferred from nearby schools, with a large segment of Negro children formerly bussed to Park Hill being transferred to Barrett, none of the Anglos from overcrowded Stedman, eight blocks away, were transferred to Barrett. And in point of fact, the small physical plant at Barrett did little to relieve the overcrowded conditions in nearby elementary schools since even after 1960 every adjacent elementary school continued to operate over its intended capacity.[3] The only school which now approached its actual intended capacity was Park Hill, which was predominantly Anglo. This is an unjustifiable non sequitur. The site upon which the building was constructed could have handled a significantly larger facility which would have had long range effects on the overcrowded conditions of the area. Instead, for obscure reasons, the building was

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[3]

School	Capacity '59	Capacity '60	Enrollment '59	Enrollment '60	% of Capacity '59	% of Capacity '60
Columbine	780	780	901	884	116	113
Harrington	450	450	690	546	153	121
Park Hill	660	630	859	650	130	103
Stedman	630	630	687	698	109	111
Barrett	—	450	—	507	—	113

designed to hold only 450 pupils when the adjacent elementary schools in 1959 already had an excess pupil population of 617.

Although the use of Colorado Boulevard under other circumstances could prove to be a valid exercise of Board discretion, it cannot be justified under the facts here. The Board admits that other elementary school attendance areas are intersected by major traffic thoroughfares, and that in at least one instance an elevated crossing was built to facilitate pupil safety. Thus it was not an immutable boundary which absolutely precluded the extension of attendance lines. On the whole, when viewing the reason asserted by the Board for the construction of Barrett, in light of the actual results obtained, we cannot find clear error in the district court's finding that the size of the school and the location of its attendance boundaries reflected a purposeful intent to build and maintain a Negro school.

We are likewise compelled to support the findings of the trial court regarding the manipulation of boundaries and the use of mobile classroom units within the Park Hill area. These acts, found the trial court, "tend to isolate and concentrate Negro students in those schools which become segregated in the wake of Negro population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white." 313 F.Supp at 65.

The Board's refusal to alter the Stedman attendance area in 1962 was not an affirmative act which equates with de jure segregation. The evidence reflects that the proposals would have assigned Stedman students to Smith, Hallett and Park Hill Elementary Schools. Although the racial composition of each of these schools was predominantly Anglo in 1962, Park Hill was well over capacity,

Hallett was slightly over capacity, and Smith was just under capacity. But more important, the residential areas which were to be part of the transfer contained less than 5% Negroes. Thus by making those alterations in attendance zones, Stedman would have lost Anglo pupils to the other schools. There can be no racial overtones attributed to the Board's refusal in 1962 to make the requested Stedman transfers.

However, we have found no evidence, nor have appellants referred us to data, which rebuts or justifies the 1962 Hallett to Philips transfer. Both schools were predominantly Anglo at the time, but Hallett was in a transition stage going from 85 to 95% Anglo in 1962 to 41.5% Anglo in 1964, and to 90% Negro in 1969. The students which were sent to Philips were in the former Hallett-Philips optional zone and were virtually 100% Anglo. The trial court held that the only thing accomplished by the rezoning was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo. The evidence does not contradict that analysis.

The other boundary alteration that gave rise to the trial court's finding of gerrymandering of attendance zones in the Park Hill area occurred in 1964. In 1963, Hallett was 68.5% Anglo, Philips was approximately 98% Anglo; Stedman was about 19% Anglo, and Park Hill was over 95% Anglo. The first change transferred a predominantly Anglo portion out of Stedman to Hallett. Second, the Park Hill-Stedman optional zone, which was virtually all Anglo, was transferred to Park Hill. Third, a predominantly Anglo section of the Hallett district was transferred to Philips. A predominantly Anglo section of Stedman's district was sent further east to Hallett. In 1964, Hallett was reduced

to 41.5% Anglo, Philips was roughly 82% Anglo; Stedman was about 15% Anglo, Park Hill was about 90% Anglo.

Although there is a sharp conflict between the parties as to whose testimony and what data should be credited, there is evidence in the record to support the trial court's determination that these were segregative acts taken with knowledge of the effect they would have. The trend is clear that as the Negro population expanded into new neighborhoods, the predominantly Anglo clusters were transferred, by the Board, to one of the remaining predominantly Anglo schools. Smiley Junior High was deemed to be a segregated school because of the racial composition of its students and its faculty. In addition, it appears that Anglo students were permitted to transfer to predominantly Anglo schools even though they lived in the Smiley attendance area. The findings of the trial court, plus the additional effects of allowing Anglos to transfer out of Smiley, are supported by evidence of record and must be sustained.

At this point we pause to acknowledge that the problems facing the school board of any metropolitan city are varied and difficult. The complexities of managing a large school district such as Denver's in a manner which provides equal educational treatment for all students are manifestly made more difficult when, through circumstances often beyond their control, a single racial group settles in a particular neighborhood. Even so, the perplexities of the task cannot be used to justify abdication of constitutional responsibilities.

When a community experiences a steady and ascertainable expansion of Negro population resulting in a new and larger "Negro community", the school board must exercise extreme caution and diligence to prevent racial isolation in those schools. When new buildings are built, new class-

rooms added, attendance areas drawn, and teachers assigned, the board must guard against any acts which reflect anything less than absolutely neutral criteria for making the decisions. The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. *Cf.* Downs v. Board of Education of Kansas City, supra. In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area. This conduct clearly violates the Fourteenth Amendment and the rules we have heretofore laid down in the Downs and Dowell cases. *See* Taylor v. Board of Education of City School District of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961); *aff'd* 294 F.2d 36 (2nd Cir. 1961).

The second portion of appellants' first argument urges that the trial court erred in concluding that the act of rescinding Resolutions 1520, 1524 and 1531 was an act of de jure segregation in and of itself. It is their position that this was a valid exercise of the Board's legislative powers; that there was no segregative effect; and that there were no underlying segregative motivations.

Since we have sustained the findings regarding state imposed segregation in the Park Hill area schools, it is unnecessary to further decide whether the rescission of Resolutions 1520, 1524 and 1531 was also an act of de jure segregation. It is sufficient to say that the Board's adoption of those resolutions was responsive to its constitutional duty to desegregate the named schools and the trial court was within its powers in designating those Resolutions as the best solution to a difficult situation. Although the alternative plan proposed in Resolution 1533 is not totally devoid

of merit, a realistic appraisal of voluntary transfer plans has shown that they simply do not fulfill the constitutional mandate of dismantling segregated schools. In fact, the voluntary transfer plans previously employed in Denver have had a minimal effect on the segregated status of the Park Hill area schools. In sum, we conclude that the trial court properly refused to accept Resolution 1533 as a workable solution. Once state imposed segregation is found, trial courts are to employ their broad equitable powers to insure full and immediate desegregation. *See* Brown v. Board of Education, 349 U.S. 294 (1955). The implementation of Resolutions 1520, 1524 and 1531 comports with that duty and holds great promise in achieving that goal. (See Appendix I)

Appellants' second argument relates to the older core area of the city which is populated predominantly by Negroes and Hispanos. Appellees alleged in the trial court that the schools in this area were also segregated by unlawful state action. The trial court refused this plea, and it is the subject of the cross-appeal to be discussed below. However, in addition, appellees urged that a number of these same schools were offering their students an unequal educational opportunity, thus denying them their Fourteenth Amendment right to equal protection. The contention is premised on the assertion that when compared to the other schools in the district, the core area schools were offering inferior education.

The trial court preliminarily resolved that of the 27 schools allegedly offering a sub-standard education, only those with 70 to 75% concentration of either Negro or Hispano students would likely produce cognizable in-

feriority. 313 F. Supp. at 77. The schools so designated were:

School	*Anglo (%)*	*Negro (%)*	*Hispano (%)*
Bryant-Webster*	23.3	.5	75.5
Columbine*	.6	97.2	2.2
Elmwood*	7.9	0.0	91.6
Fairmont*	19.8	0.0	79.9
Fairview*	7.0	8.2	83.2
Greenlee*	17.0	9.0	73.0
Hallett*	38.2	58.4	2.6
Harrington*	2.2	76.3	19.6
Mitchell*	2.2	70.9	26.7
Smith*	4.0	91.7	3.3
Stedman*	4.1	92.7	2.7
Whittier*	1.4	94.0	4.5
Baker**	11.6	6.7	81.4
Cole**	1.4	72.1	25.0
Manual***	8.2	60.2	27.5

*Elementary **Jr. High ***Sr. High

Ultimately the trial court did conclude that these designated schools were providing an education inferior to that being offered in the other Denver schools. 313 F.Supp. at 97-99. The relief decreed varied as to each level, but generally provided that the twelve designated elementary schools, including Elyria and Smedley, are to be integrated with an Anglo composition in excess of 50%. One-half of these schools were to be desegregated and integrated by the fall of 1971, and the remainder must be desegregated and integrated by fall of 1972. Baker Junior High is to be similarly desegregated and integrated by fall of 1971. As to Cole Junior High, it could either be desegregated and integrated as are the elementary schools by fall of

1972, or it could be made the center for essential district-wide programs. Manual High is to be operated as a district-wide school for the continuation and expansion of its vocational and pre-professional programs.

Specifically, the court found (1) that on the basis of 1968 Stanford Achievement Test results, the scholastic achievement in each of the designated schools was significantly lower than in the other schools in the district; (2) that during 1968 in the designated schools there were more teachers without prior experience, more teachers on probation (zero to three years of experience), and fewer teachers with ten or more years teaching experience than in the selected Anglo schools; (3) that because of Board policy which allows intrasystem teacher transfers on the basis of seniority, the more experienced teachers transferred out of predominantly minority schools at the earliest opportunity; (4) that there are more pupil drop-outs in the junior high and senior high schools in the designated schools; and (5) that the size and age of the school building do not of themselves affect the educational opportunity at a given school, but smaller and older buildings may aggravate an aura of inferiority.

The second portion of the finding that the designated schools offer an unequal educational opportunity is premised on the conclusion that "segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity." 313 F.Supp. at 82.

Preliminarily it is necessary to determine whether a school which is found to be constitutionally maintained as a neighborhood school might violate the Fourteenth Amendment by otherwise providing an unequal educational opportunity. The district court concluded that whereas the Constitution allows separate facilities for races when

their existence is not state imposed, the Fourteenth Amendment will not tolerate inequality within those schools. Although the concept is developed through a series of analogized equal protection cases, *e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), it would appear that this is but a restatement of what Brown v. Board of Education, 347 U.S. 483, 493 (1954) said years ago: "Such an opportunity [of education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

For the moment we perceive no valid reason why the constitutional rights of school children would not be violated by an education which is sub-standard when compared to other schools within that same district, provided the state has acted to cause the harm without substantial justification in terms of legitimate state interest. If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified. Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967), *modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969).

The trial court's opinion, 313 F.Supp. at 81, 82, 83, leaves little doubt that the finding of unequal educational opportunity in the designated schools pivots on the conclusion that segregated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity. The quality of teachers in any school is manifestly one of the factors which affects the quality of schooling being offered. And the evidence of the case supports the finding that the teacher experience in the designated core area schools is less than that which exists in other Denver

schools. However, we cannot conclude from that one factor—as indeed neither could the trial court—that inferior schooling is being offered. Pupil dropout rates and low scholastic achievement are indicative of a flaw in the system, but as indicated by appellees' experts, even a completely integrated setting does not resolve these problems if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. Thus it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs.

As stated in the first instance then, the trial court's findings stand or fall on the power of federal courts to resolve educational difficulties arising from circumstances outside the ambit of state action. It was recognized that the law in this Circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination. 313 F.Supp. at 71. In the course of explicating this rule and holding that the core area school policy was constitutionally maintained, the trial court rejected the notion that a neighborhood school system is unconstitutional if it produces segregation in fact. However, then, in the final analysis, the finding that an unequal educational opportunity exists in the designated core schools must rest squarely on the premise that Denver's neighborhood school policy is violative of the Fourteenth Amendment because it permits segregation in fact. This undermines our holdings in the Tulsa, Downs and Dowell cases and cannot be accepted under the existing law of this Circuit.

We cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere. Appellees observe that several of the federal district courts across the land have indicated that because of the resulting deficiencies, the federal courts should play a role in correcting the system. Davis v. School District of the City of Pontiac, 309 F.Supp. 734 (E.D.Mich. 1970); United States v. School District 151 of Cook County, Illinois, 286 F.Supp. 786 (N.D.Ill. 1968); Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967); Blocker v. Board of Education of Manhassett, New York, 226 F.Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Education of the Town of Hempstead, 204 F.Supp. 150 (E.D.N.Y. 1962); and Jackson v. Pasadena City School District, 382 P.2d 878 (S.C.Cal. 1963). However, the impact of such statements is diminished by indications in the Hobson, Blocker, Branche, Cook County, Pontiac, and Jackson cases that the racial imbalance resulted from racially motivated conduct.

Our reluctance to embark on such a course stems not from a desire to ignore a very serious educational and social ill, but from the firm conviction that we are without power to do so. Downs v. Board of Education, 336 F.2d at 998. Before the power of the federal courts may be invoked in this kind of case, a constitutional deprivation must be shown. Brown v. Board of Education, 347 U.S. 483, 493-95 (1954) held that when a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of the segregated children are violated. We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Deal v. Cincinnati

Board of Education, 369 F.2d 55 (6th Cir. 1966); 419 F.2d 1387 (1969); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963). Unable to locate a firm foundation upon which to build a constitutional deprivation, we are compelled to abstain from enforcing the trial judge's plan to desegregate and integrate the court designated core area schools.

Although the Board is no longer required by court order to correct the situation in the core area schools, we are reassured by the Board's passage of Resolution 1562 that the efforts made thus far will be only the beginning of a new effort to relieve the problems of those schools. In Resolution 1562, the Board has resolved that regardless of the final outcome of this litigation, it intends to improve the quality of education offered in the system. And it specifically directs the Superintendent and his staff to devise a comprehensive plan "directed toward raising the educational achievement levels at the schools specified by the District Court in its opinion." The salutary potential of such a program cannot be minimized, and the Board is to be commended for its initiative. Because of the significance of the Resolution, it is set out in full in Appendix II.

Appellants have also urged that mandatory bussing of students from the core area schools is neither compelled by the Constitution nor allowed by the Civil Rights Act, 42 U.S.C. § 2000c-6(a)(2). Although the disposition of the issue regarding the status of segregation in the core area schools obviates the necessity of deciding that issue, it is perfectly clear to us that where state imposed segregation exists, as it does in the Park Hill area, bussing is one of the tools at the trial court's disposal to alleviate the condition. It cannot be gainsaid that bussing is not the panacea

of segregation. But, after considering all the alternatives, if the trial court determines that the benefits outweigh the detriments, it is within its power to require bussing. Swann v. Charlotte-Mecklenburg Board of Education —— U.S. —— (1971).

The cross-appeal is first directed at the core schools which the district court refused to label as segregated by state action. At the outset, cross-appellants argue that they were required to labor under an erroneous burden of proof, and that the degree of justification for permitting racially imbalanced schools to exist was too low. The law of this Circuit guides us to approve the trial court's manner of handling the contested issues.

With the knowledge that we have said that neighborhood schools may be tolerated under the Constitution, it would be incongruous to require the Denver School Board to prove the non-existence of a secret, illicit, segregatory intent. It was indicated in the Tulsa case that neighborhood school plans are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial homogeny of given schools. United States v. Board of Education of Tulsa County, 429 F.2d at 1258-59. But that case dealt with a school system which had previously operated under a state law requiring segregation of races in public education. As in all disestablishment cases where a former dual system attempts to dismantle its segregated schools, the burden was on the Tulsa School Board to show that they had undertaken to accomplish a unitary public school system. Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent. Cross-appellants' reliance on United States v. School District 151 of Cook County, Illinois, 286 F. Supp. 786 (N.D.

Ill. 1968), aff'd 404 F.2d 1125 (7th Cir. 1968), is misplaced for the same reasons set out above. In that case, the court was likewise dealing with a school district which was segregated by unlawful state action.

Where, as here, the system is not a dual one, and where no type of state imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action. Once a prima facie case is made, the defendants have the burden of going forward with the evidence. Hobson v. Hansen, 269 F. Supp. at 429. They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate state interests. But the initial burden of proving unconstitutional segregation remains on plaintiffs. Once plaintiffs prove state imposed segregation, justification for such discrimination must be in terms of positive social interests which are protected or advanced. The trial court held that cross-appellants failed in their burden of proving (1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools.

The evidence in this case is voluminous, and we have attempted to carefully scrutinize it. Thorough review reflects that cross-appellants have introduced some evidence which tends to support their assertions. However, there is also evidence of record which supports the findings of the trial court, so under Rule 52 F.R.Civ.P. 28 U.S.C., we must affirm. It must be remembered that we do not review this record de novo but can reverse fact findings only upon *clear* error. That kind of mistake is not extant here. The background of the allegedly unlawful acts and the

trial court's analysis of the Board's discriminatory intent and/or causation, with which we agree in each instance, follows.

The New Manual High School was constructed in 1953, just two blocks from old Manual High School. Through the years, from 1927 to 1950, Manual High had enrolled lessening numbers of Anglo students until in 1953, the school was less than 40% Anglo, about 35% Negro, and about 25% Hispano. The attendance zone for New Manual was the same as it had been for Manual, opening at about 66⅔% capacity. Cross-appellants contend that the construction of New Manual at its present location insured its segregated character, and that this act was equivalent to state imposed segregation. The trial court refused this argument on two grounds: First, that the decision to build New Manual on its present site was not racially motivated, and, second, that state action was not the cause of the current racial imbalance. 313 F. Supp. at 75.

In 1956 the Board adopted boundary changes which directly affected Manual High School (42% Negro) and Cole Junior High School (40% Negro). A portion of the Manual—East High optional attendance area was converted to a mandatory Manual attendance zone, and a portion of the Cole—Smiley Junior High optional attendance area was made a mandatory Cole attendance zone. The new mandatory zones were coterminus with the approximate eastern boundary of the Negro residential movement. Again the trial court held that cross-appellants had failed to establish that the boundary changes were racialy motivated or that those alterations caused the current racial imbalance. 313 F. Supp. 75.

In 1962 the Board adopted boundary changes which eliminated the optional attendance zones on three sides of Morey Junior High School. The changes involved trans-

ferring the Morey-Hill optional zone to Hill Junior High; the Morey-Byers optional zone to Byers Junior High; the Morey-Cole optional zone to Morey Junior High; and the Baker-Morey optional zone to Morey. Morey is located on the south side of the Cole attendance area and declined from 71% Anglo in 1961 to 45% Anglo in 1962. The trial court found, however, that despite the apparent segregatory effect at Morey, the concentration of Negroes at Cole was relieved, and the facilities at Hill, Byers and Baker Junior High Schools were better utilized. Thus, although on the surface the alterations appear to be racially inspired, there is evidence to sustain the trial court's finding that the changes were not carried out with the design and for the purpose of causing Morey to become a minority school. 313 F. Supp. at 72.

Cross-appellants have also alluded to other factors which they urge are probative of segregatory intent, i.e., faculty and staff assignments, obfuscation of minority achievement data, and double standards in dealing with overcrowding. Although minority teachers were usually located in the core area or Park Hill area schools, the Board's reason for doing so was not reflective of segregative desires. It operated on the prevailing educational theory of the day, the Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understanding for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system

and has reduced the percentages of Negro teachers in the predominantly minority schools.

We are unable to see how the evidence regarding the obfuscation of minority achievement data relates to the Board's alleged segregative intent. And although cross-appellants urge that a double standard was used to deal with overcrowded conditions, the trial court's reluctance to premise segregatory intent on that basis is supported by the record. The evidence reflects that the bussing of Anglo students was caused by the city's annexation of residential areas that did not have school buildings. Hence the school children in these annexed areas were transported to the nearest school where space was available. The premise of alleging a double standard in the treatment of races is resultingly non-existent.

The remainder of the issues designated in the cross-appeal have either been disposed of or made irrelevant by preceding parts of this opinion.

The Final Judgment and Decree of the trial court is affirmed in all respects except that part pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded, this issue having been presented by the Second Count of the Second Cause of Action contained in the complaint. In that respect only, the judgment is reversed. The case is accordingly remanded for the implementation of the plan in accordance with this opinion. The trial court is directed to retain jurisdiction of the case for the purpose of supervising the implementation of the plan, with full power to change, alter or amend the plan in the interest of justice and to carry out the objective of the litigation as reflected by this opinion.

APPENDIX I

RACIAL AND ETHNIC COMPOSITION OF SUBJECT SCHOOLS WITH RESPECT TO USE OF RESOLUTIONS 1520, 1524 AND 1531

If Resolution 1520 is used:[1]

Senior High School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
East	2,600	1,776	68	649	25	175	7
George Washington	2,896	2,528	87	333	11	35	1
South	2,739	2,258	82	147	5	334	12
Totals	8,235	6,562	80	1,129	14	544	7

If Resolution 1520 is not used:[2]

Senior High School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
East	2,623	1,409	54	1,039	40	175	7
George Washington	2,942	2,823	96	84	3	35	1
South	2,670	2,330	87	6	0	334	13
Totals	8,235	6,562	80	1,129	14	544	7

[1] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials, *The Review*, Vol. XLIX, April, 1969. [Plaintiffs' Exhibit 7C]

[2] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 7D]

If Resolutions 1520 and 1524 are used:[3]

Junior High School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Byers	1,241	1,053	85	110	9	78	6
Cole	944	9	1	661	70	274	29
Grant	885	696	79	107	12	82	9
Hill	1,303	1,035	79	226	17	42	3
Kepner	1,483	1,016	69	70	5	397	27
Kunsmiller	1,949	1,544	79	245	13	160	8
Merrill	1,578	1,350	86	205	13	23	1
Rishel	1,286	939	73	39	3	308	24
Smiley	1,333	960	72	306	23	67	5
Thomas Jefferson	1,637	1,584	97	45	3	8	0
Totals	13,639	10,186	75	2,014	15	1,439	11

If Resolutions 1520 and 1524 are not used:[4]

Junior High School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Byers	1,138	1,053	93	7	1	78	7
Cole	1,219	46	4	884	73	289	24
Grant	815	696	85	37	5	82	10
Hill	1,753	1,685	96	26	1	42	2
Kepner	1,437	1,016	71	24	2	397	28
Kunsmiller	1,709	1,544	90	5	0	160	9
Merrill	1,578	1,550	98	5	0	23	1
Rishel	1,250	939	75	3	0	308	25
Smiley	1,553	367	24	1,112	72	74	5
Thomas Jefferson	1,597	1,584	99	5	0	8	1
Totals	14,049	10,480	75	2,108	15	1,461	10

[3] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials, *The Review*, Vol. XLIX, April, 1969. [Plaintiffs' Exhibit 8C]

[4] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 8D]

Opinion of Court of Appeals of June 11, 1971

If Resolution 1531 is used:[5]

Elementary School	*Total*	*Anglo*		*Negro*		*Hispano*	
	No.	*No.*	*%*	*No.*	*%*	*No.*	*%*
Asbury	570	480	84	61	11	29	5
Ashley	368	444	81	60	11	44	8
Barrett	368	269	73	88	24	11	3
Carson	720	562	78	144	20	14	2
Denison	580	482	83	31	5	67	12
Force	922	744	81	86	9	92	10
Montclair & Annex	753	602	80	120	16	30	4
Moore	622	460	74	90	14	72	12
Palmer	482	390	81	72	15	19	4
Park Hill	863	682	79	112	13	69	8
Philips	584	409	70	128	22	47	8
Schenck	765	638	83	31	4	96	13
Steck	431	353	82	73	17	4	1
Stedman	566	27	5	514	91	25	4
Steele	569	424	75	103	18	42	7
Whiteman	550	429	78	99	18	22	4
Totals	9,893	7,395	75	1,812	18	683	7

[5] Source: Compiled from *The Review*, Official Publication, Denver Public Schools, Vol. XLX (sic), May, 1969, supplemented by information supplied by school officials. [Plaintiffs' Exhibit 9D]

If Resolution 1531 is not used:[4]

Elementary School	*Total* No.	*Anglo* No.	%	*Negro* No.	%	*Hispano* No.	%
Asbury	540	480	90	31	6	29	5
Ashley	550	472	86	35	6	43	8
Barrett	423	1	0	410	97	12	3
Carson	629	568	90	42	7	19	3
Denison	550	482	88	1	0	67	12
Force	862	744	86	26	3	92	11
Montclair	634	588	93	16	2	30	5
Montclair Annex	161	158	98	3	2	0	0
Moore	580	460	79	48	8	72	12
Palmer	482	442	92	24	5	16	3
Park Hill	968	684	71	228	23	56	6
Philips	555	307	55	208	37	45	8
Schenck	735	638	87	1	0	96	13
Steck	410	353	86	44	10	13	3
Stedman	686	27	4	634	92	25	4
Steele	499	424	85	33	7	42	8
Whiteman	610	537	88	49	8	24	4
Totals	9,869	7,365	75	1,823	18	681	7

[4] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Elementary Schools*—September 23, 1968, Denver Public Schools, Division of Personnel Services. [Plaintiffs' Exhibit 9E]

APPENDIX II

WHEREAS, this Board of Education, in common with other boards of education in urban areas in this country, has before it the extremely difficult task of providing relevant and effective education to children of infinitely varied backgrounds and abilities; and

WHEREAS, this Board of Education is concerned about all the children of Denver and is constantly searching for ways and means to improve the quality of education offered to them; and

WHEREAS, this Board of Education has, as an interim measure, adopted various plans and approaches toward the improvement of the quality of education offered to the children of Denver, including voluntary open enrollment with transportation provided; and

WHEREAS, the intervention of a lawsuit in the United States District Court has prevented this interim measure from achieving its full potential; and

WHEREAS, that Court in its Memorandum Opinion dated March 21, 1970, has found that certain schools of this School District show average pupil achievement below the city-wide average achievement of pupils; and

WHEREAS, this Board is, and has been, aware of these differences in average pupil achievement among the various schools and has been attempting to set educational policy which will permit the professional staff of this School District to devise and employ new methods of education designed to improve achievement in all schools including those with low achievement averages, by such means as early childhood education, intensified reading programs, cultural

arts centers, outdoor education centers, school clusters or complexes, in-service education, modification and expansion of curricular offerings, and other promising ideas; and

WHEREAS, the United States District Court now has invited this Board to devise and present to it a plan designed to improve the achievement of pupils in certain of its schools;

NOW, THEREFORE, IT IS RESOLVED by this Board of Education that, regardless of the final outcome of the litigation, this Board reaffirms its intent to continue improvement in the quality of education offered to all of the children of Denver, and it hereby directs the Superintendent and his staff to devise a plan directed toward raising the educational achievement levels at the schools specified by the District Court in its opinion. This plan shall be a pilot program which shall include consideration of the following:

1. Differentiated staffing;
2. Increasing the level of faculty experience and decreasing faculty turnover;
3. Increased and improved inservice training for staff;
4. Voluntary open enrollment as opposed to mandatory transfers for pupils;
5. The school complex concept which will focus on decentralized decision-making, community and parent involvement, new educational programs and agency cooperation;
6. Early childhood education;
7. Special programs now being implemented at Cole Junior High School and Manual High School;

8. Special programs available under the Educational Achievement Act of Colorado (Senate Bill 174);

9. Other promising educational innovations.

The plan shall be feasible and within the financial ability of the District, and include a timetable for implementation.

Such a plan shall be submitted to the Board on or before May 6, 1970.

Judgment of Court of Appeals

May Term—June 11, 1971

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

No. 336-70

Wilfred Keyes, *et al.*,

Plaintiffs-Appellees,

v.

School District No. 1, Denver, Colorado, *et al.*,

Defendants-Appellants.

No. 337-70

(Cross-appeal)

Wilfred Keyes, *et al.*,

Plaintiffs-Appellants,

v.

School District No. 1, Denver, Colorado, *et al.*,

Defendants-Appellees.

These causes came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and were argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed in all respects except that part

pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were maintained in violation of the Fourteenth Amendment because of the unequal educational opportunity afforded, this issue having been presented by the Second Count of the Second Cause of Action contained in the complaint. In that respect only, the judgment is reversed. The case is accordingly remanded for the implementation of the plan in accordance with this opinion. The trial court is directed to retain jurisdiction of the case for the purpose of supervising the implementation of the plan, with full power to change, alter or amend the plan in the interest of justice and to carry out the objective of the litigation as reflected by the opinion of this Court.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By /s/ MARYLEE DOWNING
Deputy Clerk